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LAWS OF ENGLAND  
VOLUME IV

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ENCYCLOPÆDIA  
OF THE  
LAWS OF ENGLAND

BEING A  
NEW ABRIDGMENT  
BY THE  
*MOST EMINENT LEGAL AUTHORITIES*

UNDER THE GENERAL EDITORSHIP OF  
A. WOOD RENTON, M.A., LL.B.  
OF GRAY'S INN, AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW

VOLUME IV  
*COUNTY DISTRICT TO EMPLOYERS AND  
WORKMEN*

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# ENCYCLOPÆDIA

OF

## THE LAWS OF ENGLAND

**County District.**—County districts were created by the Local Government Act of 1894, and must be carefully distinguished from the “county divisions” of earlier Acts. There are about a thousand county districts, and each elects its district council (see DISTRICT COUNCIL). A county district is either “rural” or “urban.” A rural county district corresponds to the rural area of a Poor Law Union. An urban county district may be a borough; if not a borough, it takes the place of an Improvement Act district or the sanitary district of the former Local Board. The expression “county district” includes every urban and every rural district, whether a borough or not (Local Government Act, 1894, s. 21). The county council has power under sec. 57 of the Local Government Act of 1888, which is incorporated into the Local Government Act of 1894, to alter and define the boundaries of any county district, and to form new county districts. And care is always taken that the whole of every parish shall, in the absence of very special reasons, be included in the same county district (Local Government Act, 1894, s. 36 (c) ii.).

**County Electors Act.**—See REGISTRATION.

**County (Offences).**—In the case of offences against county property it was, under 7 Geo. IV. c. 64, s. 15, usual to describe the property as belonging to the inhabitants of the county. All county property vested in a county council by the Local Government Act, 1888, can be properly described as the property of the council, apparently without prejudice to the old mode of description (see *R. v. Smallman*, [1897] 1 Q. B. 4). As to the proper venue or place of trial for offences committed on the border of two counties, or on rivers passing through two counties, see VENUE.

**County Palatine.**—See DURHAM; LANCASTER, ETC.

**County Property.**—By subsec. (1) of sec. 64 of the Local Government Act, 1888, all property of the Quarter Sessions of a county, or

held by the clerk of the peace, or any justice or justices of a county, or treasurer, or commissioners, or otherwise for any public uses and purposes of a county or any division thereof, passed to and vested in and is to be held in trust for the council of the county, subject to all debts and liabilities affecting it. The county council holds it for the same estate, interest, and purposes, and subject to the same covenants, conditions, and restrictions, for and subject to which that property would have been held if the Act had not passed, so far as those purposes are not modified by the Act. But with this property are also transferred all duties and liabilities of the inhabitants of the county (s. 79 (2)); and see *Montgomeryshire v. Pryce-Jones*, 1893, 57 J. P. 308.

There are only three *quasi*-exceptions to this general transfer of county property. The records of the Court of Quarter Sessions remain in the custody of the clerk of the peace; any pictures or other property presented to the justices, or purchased by them out of their own funds, remain their property; all charitable trust funds remain under the control of the former trustees. But by sec. 1 of the 55 & 56 Vict. c. 15, the council of any county or county borough may, if they think fit, pay or contribute towards the expenses of any inquiry conducted by the Charity Commissioners into any charities which are, by the trusts governing their administration, expressly appropriated in whole or in part for the benefit of their county or county borough or of any part thereof.

Every county council is a body corporate by the name of "the county council of ——" (naming the county); it has perpetual succession and a common seal, and power to acquire and hold land for the purposes of its constitution without licence in mortmain (*Local Government Act, 1888*, s. 79 (1)). Hence, in all proceedings, civil or criminal, such property may be laid in the county council by its corporate name.

**County Rate.**—The county council derives some small income from its property in the shape of tolls, rent, royalties, etc. It receives also from time to time fines inflicted for breach of by-laws or statutes. It has in some cases power to raise loans (see *BORROWING POWERS*, vol. ii. p. 219). It also receives a share of the income derived from certain licence duties collected by the Imperial Government in the county, together with a proportion of the probate duty collected in the United Kingdom. These contributions from the Imperial Exchequer are carried to a separate account, called the "Exchequer Contribution Account"; and they must be devoted primarily to the payment of poor law officers, medical officers of health, registrars of births and deaths, and other statutory officials, and cannot be used for the general purposes of the county till these prior claims are satisfied. Then by the *Local Taxation Act, 1890* (53 & 54 Vict. c. 60), a certain portion of the English share of the customs and excise duties may be distributed between county and county borough funds, to be used primarily for payment of the officials mentioned above, and then for purposes of technical education. The income derived from these various sources is far from sufficient to meet the expenditure for general county purposes. Hence the county council levies a county rate under the *County Rates Act, 1852* (15 & 16 Vict. c. 81).

For this purpose each county council has an assessment committee of its own, which may either adopt the existing poor law valuation or make a valuation of its own. It frequently adopts the poor law valuation, with certain modifications, which are generally in favour of the ratepayer. It

then divides the amount to be raised among the various parishes in the county, according to the value of the property comprised in each parish. The Council issues its precept to the guardians of each union, bidding them collect from each parish, outside a Quarter Sessions borough, the amount so found due from it. The guardians pay the amount to the county treasurer, and recover it from the overseers of each parish. If the amount be not paid by the guardians within the time named in the precept, the county council may themselves order the overseers to collect the amount due from each parish; and, if they fail to do so, may distrain on the overseers. All appeals against a valuation or a rate are still heard as heretofore by the justices or a recorder in Quarter Sessions, and not by the county council.

All moneys received by or on behalf of a county council, from any source other than the Imperial Exchequer, are carried to its county fund account. Money can only be drawn out of that account by the county treasurer, and he will draw none out without an order of the council, signed by at least three members of the finance committee. All moneys so drawn out can only be used for county purposes, *i.e.* to meet expenditure incurred by the county council in the exercise of its statutory powers or in the due execution of its statutory duties (see s. 68 of the Local Government Act, 1888; *R. v. Dolby*, [1892] 2 Q. B. 736). The Statute 53 Vict. c. 3 permits a county council to subscribe any sum, not exceeding thirty guineas a year, to the funds of the Association of County Councils of England and Wales, and also to pay the reasonable expenses of not more than four representatives attending its meetings.

**County Sessions.**—See PETTY SESSIONS; QUARTER SESSIONS; SPECIAL SESSIONS.

**County Vote.**—See FRANCHISE.

**Coupon.**—A coupon is an undertaking to make a particular payment of interest or dividend attached to a debenture or other security for the principal sum, so that it can be cut off and presented for payment separately. It requires no stamp if attached to and issued with the security or a renewal of it (Stamp Act, 1891, s. 39 (11)). Forms of coupons, and of the usual provisions in debentures respecting them, are given in *Palmer's Company Precedents*.

**Coursing.**—The chase of a hare or a rabbit with dogs. In *Aplin v. Porritt*, [1893] 2 Q. B. 57, an unsuccessful attempt was made to bring within the Acts for preventing cruelty to animals (see ANIMALS) certain practices with reference to the coursing of wild rabbits captured a few days previously and kept for the purposes of the pastime.

**Court Baron and Court Leet.**—English law of the thirteenth century seems to have admitted to the full the principle that any lord who has tenants enough to form a court, may hold a court of and for his tenants. In other words, so far as king and State are concerned, the

mere fact of tenure gives the lord jurisdictional rights over his tenants. • In order, however, that he may be able to exercise this jurisdiction, it is necessary that he should have "suitors" bound to attend his court, and to sit there as judges. Whether the mere fact that B. held land of A. would give A. the right to exact from B. this "suit of court," had been a debated question. In 1269 this point was settled by the Statute of Marlbridge [Marlborough], which (c. 9) provided that suit of court was only exigible if (1) it had been expressly stipulated for on the occasion of the feoffment, or (2) it had been customably done for a considerable while, namely, from before a certain day in 1230 that was fixed by this statute. This provision, together with the prohibition of subinfeudation which followed in 1290 (Stat. Westm. III.), had the effect of preventing any further creation of new Courts. The lawyers of a later time were thus enabled to say that (if franchises were left out of account) only the lord who had a manor could hold a court for his tenants, and that manors could no longer be freely created. This had the effect of giving a new edge to the old term "manor"; the court became an essential, perhaps the essential, feature of the manor. But it is not very easy to acquit our legal theory of the circular logic which argues sometimes from court to manor, and sometimes from manor to court.

The court which a lord was entitled to hold merely because he had tenants and suitors, or merely because he had a manor, was a court of civil (non-criminal) jurisdiction. In the first place, it was in theory the court which could decide proprietary, as distinguished from merely possessory, disputes touching any land that was admittedly held by immediate tenure of that lord. However, ever since the days of Henry II. this principle had been held in check by the rule that no one need answer for his freehold except to the king's writ. If, therefore, M. claimed to hold of A. the land of which X. was seised, M. had to obtain from the royal chancery a writ directing A. to entertain the cause, and "do full right" in it (*breve de recto tenendo*). Such a writ contained a threat that, if the lord made default, the king's sheriff would interfere, and, as a matter of fact, it was in general easy for either litigant to procure a removal of the cause first into the County Court, and then into a Court held by the king's justices. Also the king's Court began to provide the claimants of land with numerous actions, which, while in theory they were possessory, and justified by the principle that the king himself will protect the freeholder in his seisin, could in practice be used as substitutes for the old proprietary action brought in the lord's court by the writ of right. The abolition of military tenures, the fall in the value of money, and the consequent depreciation of the old rents due from freeholders, obliterated the importance of mesne tenure, and accomplished the long process which had been reducing the feudal courts to insignificance. Still until the abolition of the real actions in 1833, the purely proprietary action for land, "the writ of right," was one which in theory should have been commenced and prosecuted in the court of that lord (if any) of whom the successful litigant would hold the debateable tenement.

The feudal court was also competent to entertain a personal action, such as debt or trespass against a tenant of the manor; but in some way that has not been fully explained, its competence in this region was, like that of the County and Hundred Courts, confined to causes in which no more than forty shillings were claimed, so that here again it suffered by the influx of gold and silver. It seems possible that this restriction was brought about by a clause in the Statute of Gloucester (6 Edw. c. 8).

If for a while we leave out of account the villeins and the villen tenements, these were the main powers of a court held by a lord who had no special rights of justice, no franchises, granted to him by the king. But very often the lord was a franchise-holder. The jurisdictional franchises were of various kinds, extending upwards to those of the palatine earl. Not unfrequently the lord had some criminal or penal justice, in particular the franchise of *infangthief*, or right to hang thieves if they were taken within his precinct in the act of theft, at all events if they were his own men. But the franchise that is of most interest in this present context is the lowly but very common franchise known as "view of frankpledge." In this case the lord claimed to exercise in his court certain powers which, according to the general law, were exercised by the sheriff in his tourn, namely, (1) the right and duty of seeing that all the men who ought to be in frankpledge were in frankpledge, and taking the consequent amercements, and (2) the right and duty of holding what we might call a police court, wherein a jury made presentments both of serious crimes and of pettier offences. In the case of a presentment of felony, the lord, like the sheriff, could only see to the arrest of the offender; many of the smaller misdeeds, brawls, affrays, and public nuisances could be punished on the spot by amercements. The interrogatories that were set before the jurors were known as the articles of the view of frankpledge.

In the later Middle Ages a seignorial police court of this sort, or perhaps we should rather say a seignorial court when exercising these police powers, gained the name of "a leet," and somewhat later of "a Court leet." The origin of this name is exceedingly obscure. In Domesday Book and some later documents we find traces of an arrangement which divided the hundreds of Norfolk and Suffolk into subdistricts that were called "leets." For a long time the word seems to be peculiar to eastern England. The lawyers of the fourteenth and fifteenth centuries seem to adopt and disseminate it as a brief equivalent for "the court of the view of frankpledge." Coke (4 Inst. 265) has remarked that even in his day the formal style of what was commonly called "a leet" or "a Court leet," was *Curia visus franci plegii*.

The term "Court baron" seems originally to indicate any lord's court. Possibly in the twelfth century our law was nearly taking the turn which French law sometimes took, namely, that of making a lord's jurisdictional power dependent on his personal rank. It might thus have become true that none but a baron could hold a court. But our law did not take this turn; it connected jurisdiction with the fact of tenure rather than with the lord's rank. However, the men who were maintaining seignorial courts were very often barons, for, unless a lord had a good many tenants, a court would be more trouble than profit, and so a usage which spoke of a seignorial court as a baron's court, or Court baron (in old French, *la Court le baron*), was not unnatural.

The vigorous attempts made by Edward I. to resume into its own hands those franchises which the lords were exercising without sufficient warrant established a sharp contrast between the Court baron and the Court leet. It was settled law, and law that the king was strenuously endeavouring to enforce, that the view of frankpledge and its attendant police jurisdiction were franchises which could only be claimed by royal grant, or by a prescription which went behind the time of memory. On the other hand, without specialty or prescription, the lord of a manor had, as we have said, a certain civil jurisdiction over his tenants. Thus in legal theory the Court leet is distinguished from the Court baron both by its origin and

by its competence. Moreover, in the Court baron the suitors were the judges or "doomsmen." The lord or his steward would preside there, but to make a judgment was the function of the assembled suitors: *Curia domini debet facere iudicia et non dominus*. It is to be remembered that the procedure traditional in these old local courts came down from a time which knew no trial by jury, and looked for proof of disputed facts to battles or ordeals or oaths with oath-helpers. On the other hand, we are told that in the leet the steward is the only judge. In theory the leet, if a seignorial, is also a royal court; it is no mere "Court baron" (lord's court); and the steward represents the king "for the day." Also the business of the leet consists for the most part of the employment of that procedure by way of "presentment" which involves the presence of a jury, and which cannot be traced beyond the days of Henry II. Such a procedure left no room for "doomsmen" of the old sort.

The leet began to lose its importance in the fourteenth century. The courts held by the justices of the peace slowly sucked away its life-blood. They were modern, and it was ancient. There was no legislation directed against it; none was necessary; and in some cases the practice of keeping up a Court leet has endured until our own day. Also previously to the great municipal reformation of 1835 there were towns in which the Court leet had developed into something like a governing assembly. It is believed that in general these were towns which, either because they were under mesne lords, or for some other reason, had been backward in obtaining chartered liberties and definite "incorporation." In such cases some of the work which elsewhere would have been done by a common council was done in the Court leet. Manchester is an example of a town in which the leet became important. But this line of development cannot be regarded as normal, and the true function of the leet, from first to last, seems to be what we should describe as the function of a police court.

It remains to notice that according to established theory the court that a lord holds for his freeholders is to be distinguished from that which he holds for his copyholders, the latter being spoken of as a "customary Court." In the twelfth and thirteenth centuries the lord's power over villeins and villein tenements was very great. So long as he neither killed nor maimed his "serfs," the king's Court would not interfere between him and them, nor would it protect an unfree or base tenure. As a matter of fact, however, the lord did justice in his court upon and between his villeins, and it is far from being clear that, in their civil disputes, he or his steward usually acted as the sole judge. The early manorial rolls seem to show us that free men and villeins, freeholders and tenants of base tenure, attended the same courts and got much the same kind of justice there. Personal serfdom was dying out in the fifteenth century, and the tenant by base tenure under the name of copyholder had acquired in his tenement rights that were protected, even against his lord, by the action of ejectment. Thenceforward it was a question of little moment whether, if litigation about copyholds were taken to the lord's court, his steward would be the only judge, and the establishment of the now accepted theory could do little harm. When once the king's Courts have opened their doors to litigation about copyholds, the so-called customary Court rapidly loses as a matter of fact, though it has never lost as a matter of law, its power to entertain and determine such litigation. It continues, however, to be the scene of surrenders and admittances, unless they are made "out of court," and a jury is sometimes sworn to make presentments as to the lord's rights in the customary tenements, herlots, fines, and so forth. The Copyhold Act of 1894, ss. 83-85, has gone far

towards making a customary Court a thing of the past, by (*e.g.*) declaring in general terms that a valid "admittance" can be made without holding a court.

[*Authorities.*—The historical view stated in this article is based upon the Introduction to *Select Pleas in Manorial Courts*, vol. i. (Selden Society, 1889), where the authorities for it are given.]

**Court for Crown Cases Reserved.**—See CROWN CASES RESERVED.

**Court of Marches.**—The Court of "the Lord President of the Marches" was created in the fifteenth century by royal authority, probably by Edward IV. The object of its foundation was to set up a royal jurisdiction in those portions of Wales and the marches where the royal writ did not run. It had its seat at Ludlow Castle.

The Court had admitted power to hold pleas of damages or debt to £50 (*Powell v. Sheen*, 14 Car. Cas. 9).

It was also an administrative council, exercising functions somewhat in the nature of the Privy Council, being held responsible for the peace of the country, and interfering to some extent in ecclesiastical matters.

It consisted of a president, vice-president, a council, with certain subordinate officers. It was recognised in and continued by the 34 & 35 Hen. VIII. c. 26, s. 41, and in Tudor and Stuart times it played an important part in the government of Wales. It was abolished by the Act 1 Will. & Mary, c. 27. (See further the article WALES.)

[*Authorities.*—The records of the Court are still for the most part unpublished. See Clive, *History of Ludlow*, for an account of the Presidents of the Marches.]

**Court of Passage.**—See PASSAGE COURT.

**Court of Requests.**—The Court of Requests was a minor Court of equity held before the Lord Privy Seal. It ceased to exist in 41 Eliz. (see Spence, *Equitable Jurisdiction*, i. p. 352; 3 Black. Com. 50, 4 Inst. 97, and 16 Car. I. c. 10). There were also other inferior local Courts called Courts of Request, now abolished or obsolete (see 9 & 10 Vict. c. 95; and 3 Stephen, Com., 11th ed., p. 303).

**Court of Summary Jurisdiction** is defined by the Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 13 (11), as "any justice or justices of the peace, or other magistrates, by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his commission, or under the common law." The definition is open to criticism, as justices as such derive their jurisdiction solely from statute or commission, though their predecessors, the conservators of the peace, may have had some common law powers. A Court of summary jurisdiction is distinct from a PETTY



**SESSIONAL COURT (*q.v.*).** The effect, if not the intention, of the definition, is to make justices of the peace, when acting in exercise of any of the authorities of which they have not been shorn by the Local Government Acts of 1888 and 1894, with reference to a subject-matter which is not indisputably administrative (*e.g.* in the joint control of the county police), a Court of summary jurisdiction; and they act subject, in part at least, if not wholly, to the procedure and rules as to appeal of the Summary Jurisdiction Acts. It has been held that the definition of "Court of summary jurisdiction" applies to justices acting (1) under the Licensing Acts (*R. v. Glamorganshire Justices*, [1892] 1 Q. B. 621; *R. v. Kent Justices*, [1896] 2 Q. B. 1,306 (reversed in House of Lords, W. N. 1897, 78)); (2) for poor rates previously regarded as a ministerial function (*Fourth City Mutual Building Society v. East Ham Churchwardens, etc.*, [1892] 1 Q. B. 661); (3) in excise and bastardy cases, but not as to appeals against orders for the removal of a pauper (*R. v. Somersetshire Justices*, 1889, 22 Q. B. D. 625).

See JUSTICE OF PEACE; SUMMARY JURISDICTION.

**Court or a Judge.**—The expression "Court or a judge" is one which occurs frequently throughout the Rules of the Supreme Court. These words have been the subject of judicial interpretation in several cases. "The rule authorised the application to 'the Court or a judge' because it was meant to apply to all the Divisions, and sometimes in the Common Law Divisions it was not always possible to get a judge in chambers" (per Jessel, M. R., *Freason v. Loc*, 1877, 26 W. R. 138). "Court or a judge" means the Court sitting in banc (see BANC), or a judge at chambers (*q.v.*) representing the Court in banc (per Brett, J.A., *Baker v. Oakes*, 1877, 2 Q. B. D. 175). "On the whole, I think that the words, 'The Court or judge before whom any such matter or proceeding has been heard or shall be depending,' include any judge exercising jurisdiction on the subject, and therefore a judge at chambers" (per Grove, J., *Clover v. Adams*, 1881, 6 Q. B. D. 624). "It is well recognised that that phrase always includes a judge at chambers, unless there is some express enactment limiting the meaning of the phrase" (per Brett, M. R., *Dallow v. Garrold*, 1884, 54 L. J. Q. B. 78). "The case of a single judge sitting in Court is included under the term 'Court,' and 'judge' can only mean a judge sitting in chambers" (per Huddleston, B., *Salm Kyrburg v. Posnanski*, 1884, 13 Q. B. D. 222). "When the rules say 'the Court or a judge,' it is understood that 'the Court' means a judge or judges in open Court, and a judge means a judge sitting in chambers" (per Kay, L.J., *In re B.*, [1892] 1 Ch. 463).

The effect of the phrase "Court or a judge," therefore, is that, wherever it is used, a judge can dispose of the application either in Court or in chambers; whilst the omission of the words "or a judge" expressly confines the jurisdiction to the Court (per Brett, J.A., *Baker v. Oakes*, 1877, 2 Q. B. D. 173). Thus in *Freason v. Loc* (*ubi supra*), a case of an application to dismiss for want of prosecution, Jessel, M. R., said, "In this Division the application was often made in chambers, and it was generally best that it should be so, but such a course was not obligatory." The option thus given to a suitor is, it is submitted, far more reasonable than an attempt to lay down hard-and-fast rules defining what applications shall be made in Court and what in chambers. In the Chancery Division, where every order is in theory the order of the judge, it is especially valuable.

Thus, to give a familiar instance, it is the usual practice in the Chancery Division that opposed applications for the appointment of receivers should be made by motion in open Court; but this practice is not so stringent and inelastic as to prevent such applications being made in proper cases in chambers. Any abuse of the power to resort to the alternative process can be met by the power of the Court in its discretion to mulct a party unreasonably resorting to the more expensive method of procedure of the extra costs thereby occasioned.

In some cases, even where the rules provide for the application being made to "the Court or a judge," the usual course of the Court prescribes one method in preference to the other. Thus in *Davis v. Galmoye*, 1888, 39 Ch. D. 322, it was laid down by Cotton, L.J., that in the Chancery Division it was better that an application for leave to issue a writ of attachment should be dealt with in open Court, and that therefore it should be made, not by summons, but by motion. And the same principle was recognised in *In re B.*, [1892] 1 Ch. 459, where it was held that, though a Master in Lunacy who is holding an inquisition of lunacy has power to order a writ of attachment to issue against an alleged lunatic for the purpose of enforcing his attendance, yet in ordinary cases he ought to refer the matter to the Court in Lunacy. On the other hand, the practice in the Queen's Bench Division of the judge in chambers giving leave to issue a writ of attachment was sanctioned by a Divisional Court in *Salm Kyrburg v. Posnanski*, 1884, 13 Q. B. D. 218; *Amstell v. Lesser*, 1885, 16 Q. B. D. 187. The difference between the practice followed in the two Divisions is readily explicable by the fact, that in the Chancery Division a summons is in the first instance heard by the master and by him referred to the judge, whereas in the Queen's Bench Division the terms of Order 54, r. 12 (a), in express terms preclude a master from hearing an application relating to the liberty of the subject, and such an application comes directly before the judge.

By Order 54, r. 12, a master in the Queen's Bench Division, or a registrar in the Probate, Divorce, and Admiralty Division, may exercise all such jurisdiction as may be exercised by a judge at chambers, with certain specified exceptions. Thus a master may dispose of an interpleader summons in a summary manner under Order 57, r. 8. Such an order, however, is not an order made by "the Court or a judge" so as to preclude an appeal from his decision under Order 57, r. 11, and accordingly an appeal lies from such a decision to the judge (*Webb v. Shaw*, 1886, 16 Q. B. D. 658; *Bryant v. Reading*, 1886, 17 Q. B. D. 128).

The power given to "the Court or a judge" cannot be delegated to a master. Thus, where a discretion as to costs is given to the Court or a judge, the exercise of such discretion cannot be delegated (*Lambton v. Parkinson*, 1887, 35 W. R. 545).

See JUDGE AT CHAMBERS.

**Courts, Inferior, Superior.** — See INFERIOR COURTS; SUPREME COURT.

**Courts-Martial.** — Courts-martial are Courts constituted under statutory authority with jurisdiction to try offences committed by persons subject to military law; and these offences may be either crimes under the ordinary law, or purely military offences against the law established for the

government and discipline of the army and navy. The Acts under which the Courts are constituted are the Army Act, 1881 (44 & 45 Vict. c. 58), continued by the Annual Army Acts, and the Naval Discipline Acts, 1866 and 1884 (29 & 30 Vict. c. 108, and 47 & 48 Vict. c. 39).

For the persons who are subject to the jurisdiction of these Courts, see articles ARMY and MILITARY LAW, and ss. 175–184 of the Army Act, 1881; ss. 87–91 and ss. 6 and 13 of the Naval Discipline Act, 1866, and Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73, s. 17), and the Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 39, s. 15).

All offences against the ordinary law are punishable under the Army Act. The offences against the military law are set out in Part I. of the Army Act, and in ss. 2–44 of the Naval Discipline Act, 1866. Both classes of crimes may be tried under the Army Acts by court-martial at any place either within or without Her Majesty's dominions if it is within the jurisdiction of an officer authorised to convene general courts-martial,—that is, courts-martial which have the power to award the punishments of penal servitude and death, and try an officer,—wherever the offence has been committed. But in regard to certain crimes against the ordinary law the jurisdiction is restricted. Thus, under sec. 41, the offences of treason, treason-felony, murder, manslaughter, or rape cannot be tried by court-martial if they are committed in the United Kingdom, or in any place in Her Majesty's dominions (other than Gibraltar) which is less than one hundred miles in a straight line from some city or town where they might be tried by a competent civil Court, unless on active service. Under the Naval Discipline Act, 1866 (s. 45), the offences against military law, specified in secs. 2–44, committed anywhere by persons subject to the Act, may be tried and punished by court-martial. Offences against the ordinary criminal law may be so tried if committed anywhere out of the United Kingdom, or in any harbour, haven or creek, or on any lake or river, or anywhere within admiralty jurisdiction, or in any of Her Majesty's establishments mentioned in sec. 46, whether in or out of the United Kingdom.

If committed elsewhere, they cannot be tried under the Act.

The punishment of these offences is, speaking generally, the same as that inflicted by a civil Court; but see, for modifications, sec. 44 of the Army Act, and sec. 45 of the Naval Discipline Act, where certain graver offences, as treason and murder, or manslaughter, are separately dealt with. The less serious offences may be treated alternatively as military offences, and punished according to the provisions of the Acts. But the fact that these civil offences are triable by courts-martial does not supersede the authority of the ordinary Courts. All persons subject to the Army Act are guilty of an offence who refuse to deliver up an officer or soldier accused of an offence punishable by the civil power (s. 39); and after trial by court-martial an officer may be cashiered or otherwise punished, and a soldier may be imprisoned; and by sec. 162 a person after conviction or acquittal by court-martial may then be tried by a civil Court for the same offence, if it is an offence against the civil law. The civil Court, however, must have regard in its sentence to any punishment already suffered under the military sentence; and after a previous conviction or acquittal by a civil Court the person is not to be tried again by the military Court for the offence.

The Jurisdiction in Homicides Act, 1862 (25 & 26 Vict. c. 65), provides for the more speedy trial than under the ordinary law of a person subject to the Army Act who is charged with the murder or manslaughter of any

other person subject to such Act, in England or Ireland, by removal of the accused for trial at the Central Criminal Court (*q.r.*), or in Dublin.

Under the Naval Discipline Act, the authority of the ordinary tribunals of civil or criminal jurisdiction, or any officer thereof in Her Majesty's dominions under the common or statute law, are preserved by sec. 101.

Officers have no legal right to demand a court-martial, either in respect of charges brought against them or made by them against other persons. The same rule applies to soldiers and sailors; but a soldier may claim to be tried by a district court-martial (as to which see below) if the commanding officer (*q.r.*) proposes to deal with his case summarily, otherwise than by awarding a minor punishment, such as confinement to barracks, etc.; but the commanding officer has larger powers of summary punishment under the Naval Discipline Act than exist under the Army Act.

It is the duty of the commanding officer to investigate without delay any charge for the purpose of deciding whether or not the offender should be brought before a court-martial. If he decides that it ought to be proceeded with, he is responsible for taking the proper steps for this purpose; but he may, subject to his responsibility, dismiss the charge. Under the Army Act the commanding officer, in the former case, must apply to a superior authority, which is not defined, as it varies according to the varying conditions of service at home and abroad, for the convening of a court-martial, unless the offence is of such a nature that the powers of a regimental court-martial are deemed sufficient, and when, for any reason, he does not desire to exercise his summary powers. In such cases he may convoke a regimental Court if his rank is not below that of captain, and he is in command either of a regiment, or a detachment, or detachments of several regiments. In the navy, and in the ports of the United Kingdom, the warrant of the Admiralty has to be obtained. On foreign stations the commanders-in-chief and officers in command of detached squadrons are furnished with a commission from the Admiralty authorising them to assemble courts-martial.

The convening authority, under the Army Act, causes to be convened either a regimental, a district, or a general court-martial, which differ according to the extent of their powers of inflicting punishment, and the persons over whom they have jurisdiction. Thus, as a regimental Court cannot award more than forty-two days' imprisonment, nor discharge a soldier with ignominy, nor try an officer, nor a warrant-officer, nor a person subject to military law but not belonging to Her Majesty's forces, so a district Court cannot award any punishment higher than two years' imprisonment, cannot sentence a warrant-officer to any punishment but dismissal, and cannot try an officer. A general court-martial alone can award the punishments of death and penal servitude, and can try an officer. There is an exceptional Court, termed a Field General Court-martial, which is only convened on active service, or abroad, for the trial of offences which it is not practicable to try by an ordinary general court-martial, and, when not on active service, only when complaint has been made to the convening officer that an offence has been committed by any person, subject to military law, under his command, against the property, or person, of any inhabitant of, or resident in, the country. It has the same powers as a general court-martial, but is convened, without warrant, by any officer in command of any detachment or portion of troops beyond the seas, or by any officer in immediate command of a body of troops on active service. Its procedure is more summary, and a Provost Marshal (*q.r.*) is the executive officer

acting on behalf of the Court in the execution of sentences, etc. (see sec. 74 of the Army Act).

The legal minimum number of members is, for a regimental or district Court, three; for a general Court, nine, in the United Kingdom, India, Malta, and Gibraltar; and elsewhere five. Every member of a regimental Court must have held a commission for a year; of a district Court, two years; and must, if practicable, be officers of different corps. So of the general Court, whose members must have held their commissions for three years; and if the Court is to try a field officer, no member must be below the rank of captain. In any case no less than five members must be of a rank not below that of a captain (see s. 48). The commanding officer of the prisoner cannot sit, nor any officer, if he has had any duty in investigating the charge, or convening the Court, or is a witness for the prosecution (s. 50). The president is named by the convening officer. The rules of procedure for the conduct of the various kinds of Courts are laid down in the Rules of Procedure, 1893.

All naval courts-martial are general; there is no Court in the navy corresponding to a regimental court-martial in the army. As to the constitution of the Courts, see ss. 58-69 of the Naval Discipline Act, 1866; and for their procedure, Queen's Regulations for the Naval Service, 1879, ss. 581-620.

The sentence of a court-martial under the Army Act requires confirmation by a superior authority; this being in the case of a regimental court-martial the convening officer (s. 54); in the case of a district Court the officer authorised to convene general courts-martial, or deriving authority from such officer; in the case of a general court-martial Her Majesty, or an officer deriving authority mediately or immediately from Her Majesty. In India this power is conferred by warrant on the commander-in-chief. Elsewhere out of the United Kingdom the finding and sentence, where a commissioned officer is sentenced to death, penal servitude, cashiering, or dismissal, must be confirmed by the Queen. Sentence of death in a colony must be approved both by the military authority and by the governor. In India also this holds good, where the offence is treason or murder; but both in India and a colony a sentence of penal servitude for any offence tried as a civil offence under sec. 41 requires the approval of the governor (s. 54).

Sentences of penal servitude must be executed in the United Kingdom; and they have the same effect as such sentences passed by a civil Court in the United Kingdom. So also are sentences of imprisonment exceeding twelve months; but see sec. 131 as to certain classes of persons excepted, *e.g.* Asiatics and Africans and other persons of colour. In the United Kingdom sentences of imprisonment may be undergone in military custody; but where they exceed forty-two days, or a limit otherwise prescribed from time to time, they must be served in public prisons, civil or military, the latter being any building set apart as such by the Secretary of State under sec. 133. The sentences of naval courts-martial do not require approval or confirmation before taking effect, except in the cases of death, penal servitude, imprisonment, and corporal punishment, which must be confirmed by the Admiralty, or by the commander-in-chief on a foreign station. In cases of death, no remission, mitigation, or alteration can be made, except by the Queen, or, in other cases, by the Admiralty. There are similar provisions in regard to places of imprisonment in the Naval Discipline Act (see ss. 70-83), as have been mentioned above as to imprisonment under the Army Act.

As inferior Courts, courts-martial are subject to the jurisdiction of the High Court when their proceedings are taken without, or in excess of, jurisdiction. The members of these Courts are also liable for any injury to the person, property, or character caused by acts done by the Court where the jurisdiction assumed does not exist. But the Courts will not interfere if the injury affects only the military position or character of the person complaining (*In re Mansergh*, 1861, 1 B. & S. 400; and *In re Roberts*, 1879, *Times*, 11th June).

The general law relating to the granting of the writs of prohibition (*q.r.*), *certiorari* (*q.r.*), and *habeas corpus* (*q.r.*) is applicable to the case of courts-martial both military and naval: the cases collected in the *Manual of Military Law*, pp. 176–188, and Thring's *Criminal Law of the Navy*, illustrate both equally. The same remark is to be made regarding criminal proceedings and actions in tort for damages against members of the Court, where the rights of an individual are violated by his arrest, imprisonment, or otherwise, by order of the Court without jurisdiction, or in excess of jurisdiction. Moreover, the officer confirming the finding and ordering of the sentence to be carried into execution has the same responsibility if the sentence is illegal (see Clode, *Military and Martial Law*, p. 143). The president has no additional liability beyond the other members of the Court; but if he, or any other member, or members, is sued for the same joint act, the other members cannot be sued (*Brinsmead v. Harrison*, 1872, L. R. 7 C. P. 547).

[See ARMY; JUDGE ADVOCATE-GENERAL.]

**Cousin.**—The term “cousin” *primâ facie* means first cousin, and not a first cousin once or more times removed, or a second or third cousin (*Stoddart v. Nelson*, 1855, 25 L. J. Ch. 116; *Stearns v. Abingdon*, 1862, 31 Beav. 305). It, however, may appear from the language used by a testator that he employed the word in a more general sense; for instance, in *In re Taylor, Cloak v. Hammond*, 1886, 34 Ch. D. 255, it was held, on the construction of the will there in question, that the word “cousin” included the wife of a cousin.

A bequest to “first cousins” *simpliciter* without a context means cousins-german; and a similar bequest to “second cousins” includes only second cousins strictly so called—persons having the same great-grandfathers and great-grandmothers—and does not include children or grandchildren of first cousins (*In re Parker, Bentham v. Wilson*, 1880, 15 Ch. D. 528; S. C. in C. A., 1881, 17 Ch. D. 262). But where a testator left property to be divided amongst his “second cousins,” and he had no second cousins, either at the date of the will, or at his death, or any born afterwards, it was held that first cousins once removed were entitled (*In re Bonner, Tucker v. Good*, 1881, 19 Ch. D. 201; see also *Wilks v. Hannister*, 1885, 30 Ch. D. 512).

**Covenant, Action of.**—An action upon a covenant was the oldest form of action based upon an executory contract not creating a debt known to English law. Such actions were already common in Bracton's time (Pollock and Maitland, *Hist. Eng. Law*, ii. p. 106), and they were quite distinct from the actions, based upon promises not under seal, which were afterwards developed from the “action upon the case,” and which became known as “assumpsit” actions (see Holmes on the *Common Law*, p. 272; and an article on “The History of Contract” in *The Law Quarterly*, vol. iii. p. 166).

At the common law there was a writ of covenant (Fitzherbert, *Nat. Brev.* p. 146), but this fell into disuse long before it was abolished by the Common Law Procedure Acts (see Platt on *Covenants*, p. 542). Either an action of covenant or an action of debt could have been brought upon a covenant if the damages were liquidated, but, if they were not, the former action only (see Platt, p. 544). The action of assumpsit did not lie in either case (*ibid.*). Forms of action have long since been abolished, and an action to enforce or recover damages for the breach of a covenant is now indistinguishable from any other action based upon a contract.

[*Authorities.*—Platt on *Covenants*. For the practice in the old action of covenant, see Stephen on *Pleading*; and Tidd, *Practice*.]

## Covenants in Leases.

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The word "covenant" as applied to leases usually, but not necessarily, imports a stipulation or undertaking in an instrument under seal. No special form of words is required to make a covenant; any expressions showing an agreement by one or more of the parties that something is, or shall be done, is sufficient (*Bac. Abr. Covenant (A)*; *Shep. Touch.* 160; *Com. Dig. Covenant (A, 2)*). Nor is it material in what particular portion of the instrument such agreement may be contained (*Sampson v. Easterby*, 1829, 9 Barn. & Cress. 505). But it is essential that the intention to agree should appear; and sometimes it is a little difficult to distinguish words of agreement from those of mere condition or qualification. The ordinary covenant, for instance, by the lessee not to assign his interest without the lessor's consent is usually qualified by the addition of the words "such consent not being arbitrarily withheld"; but these words do not import a covenant on the part of the lessor that he will not arbitrarily withhold such consent (*Treloar v. Digge*, 1874, L. R. 9 Ex. 151).

No rule of general application can, of course, be laid down as to the construction of covenants except that it should be according to the intent of the parties as expressed by their own words, regard being paid to the whole of the instrument (*Iggulden v. May*, 1806, 7 East, at p. 241, per Lord Ellenborough, C.J.; 8 R. R. 623); and that if the words be of doubtful import the leaning should always be against the covenantor (*Bac. Abr. Covenant (F)*).

Where a covenant is expressed to have an alternative operation, *i.e.* to do something, and if it be not done to do something else, in order to establish a breach it is necessary that proof of failure to observe *both* alternatives be given. A covenant very commonly met with in agricultural leases—that the lessee should abstain from certain acts (*e.g.* ploughing up pasture), and if he does not that he should pay an additional rent—is of this class. But where the covenant forbids an act in express terms, the mere fact that an additional rent is provided for on its breach will not give the right of disregarding it on payment of such additional rent (see *Weston v. Metropolitan Asylum District*, 1882, 9 Q. B. D. 404).

A question not unfrequently arising in the construction of covenants in leases, and one not always easy to decide, is the question whether they are dependent or independent, that is to say, whether performance of one of them

is or is not a condition precedent to liability in respect of the other or others. When one of the parties engages to do a thing, the other "doing" another, the rule is that the covenants are independent. If, for instance, as frequently happens, the lessor undertakes to give quiet enjoyment of the premises demised, the lessee paying the rent and generally performing the covenants of the lease, it will be in itself no answer to an action for a breach of the former undertaking for the lessor to plead that the lessee's own obligations have remained unperformed (*Edgc v. Boileau*, 1885, 16 Q. B. D. 117). Where, however, an extrinsic advantage or privilege (such as the right to renew or to determine the lease) is conferred on the lessee "upon his performing the covenants," or "the covenants being performed" by him, it is otherwise; and the lessor, in answer to a claim for refusing the privilege, may rely on the non-performance of the covenants by the lessee (*Grey v. Friar*, 1854, 4 H. L. 565; *Finch v. Underwood*, 1876, 2 Ch. D. 310; *Bastin v. Bidwell*, 1881, 18 Ch. D. 238).

Another question often arising for determination in connection with the construction of covenants—though no longer possessing the same importance as in the days before the Judicature Acts, when the Courts did not enjoy their present extensive powers of amendment in respect of parties—is the question whether they are joint or several (see *Roberts v. Holland*, [1893] 1 Q. B. 663). Where a covenant is joint, on the death of a covenantor his estate cannot be resorted to, as in the case where it is several (*White v. Tyndall*, 1888, 13 App. Cas. 263); and, on the other hand, on the death of a covenantee his estate can take no benefit from it, as the whole interest enures to the survivors (*Southcote v. Hoare*, 1810, 3 Taun. 87; 12 R. R. 600). If the words in which a covenant is expressed are not expressly joint, the interest of the parties appearing on the face of the deed will determine the construction (1 Wms. Saund. 162); but if lessees covenant generally for themselves without any words of severance, or that they or one of them will do a certain thing, the covenant is joint (Platt on Covenants, p. 117), and this in spite of the fact that the holding is expressly described to be to them as tenants in common and not as joint tenants (*White v. Tyndall*, *supra*). In many cases, as is well known, covenants are expressed to be both joint and several.

It was formerly the rule that no person could sue upon a covenant in a lease, though it expressly purported to be made with him, unless he were named or described as a party in the indenture (*Lord Southampton v. Brown*, 1827, 6 Barn. & Cress. 718). But it is now in terms provided that "the benefit of a covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party" to the indenture of demise (8 & 9 Vict. c. 106, s. 5). It has, however, been an invariable rule that in order that an action may be brought upon a covenant, privity of estate must exist between the parties; so that where a lessee makes an underlease, no action for breach of the covenants of the original lease will lie against the underlessee (*Holford v. Hatch*, 1779, 1 Doug. 183). But, as will be pointed out more fully when restrictive covenants come to be dealt with, this will not prevent the lessor from obtaining an injunction against him to restrain him from committing further breaches of the covenant where it is one of a negative or restrictive character.

It is not proposed to treat here of the ordinary covenants in leases. For these reference should be made to the various heads under which they fall, e.g. RENT; REPAIRS; INSURANCE; WASTE; QUIET ENJOYMENT; RENEWAL. There are, however, certain points of view from which covenants may be regarded in a general way, and with reference to which it is fitting that



some observations should be made here. It is proposed accordingly to consider—(i.) the covenants that are implied in instruments of demise; (ii.) the covenants that may be insisted upon where an agreement is silent as to those which the lease shall contain; (iii.) the covenants the benefit and burden of which enure to persons who, though not parties to an instrument of demise, claim through or under those parties; (iv.) the covenants which restrict the user and enjoyment of demised premises, as fettering both the right of enjoyment of the subject-matter and the right of alienation. The points to be dealt with here will accordingly include—(i.) *Implied Covenants*; (ii.) “*Usual Covenants*”; (iii.) *Covenants* (as they are called) “*running with the land*”; (iv.) *Restrictive Covenants*, including (a) the covenant not to assign or underlet, and (b) the covenant in restraint of trade.

(i.) *Implied Covenants*.—That an express covenant displaces an implied one to the same effect has always been a recognised principle (*Nokes’ case*, 1598, 4 Co. 80 (b); *Line v. Stephenson*, 1838, 5 Bing. N. C. 183; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836). *Expressum facit cessare tacitum*. But the most recent authority in the Court of Appeal has introduced a good deal of doubt and uncertainty into the whole question of implied covenants, or, as they are called, covenants in law, where there are no express ones (*Baynes v. Lloyd*, [1895] 2 Q. B. 610). That the implication, if it exists, arises not from the relation of landlord and tenant, but from the use of particular language in the instrument of demise, is now established (*id.*); that it arises from the use of the word “demise” is probable but not certain; that it arises from the use of any other word, e.g. “let,” is improbable (*id.*). At present more cannot be said definitely on the subject. It is, however, well settled that where a demise is by deed a covenant in law is, as regards its duration, only co-extensive with the lessor’s own interest in the premises (*id.*; *Adams v. Gibney*, 1830, 6 Bing. 656); nor is the rule different in the case of a demise by parol (*Penfold v. Abbott*, 1862, 32 L. J. Q. B. 67). And it is immaterial that the tenant may not have had express notice of the limited character of that interest (*Schwartz v. Locket*, 1889, 61 L. T. 719).

In all demises whether by deed or by parol where the word “demise” is used in the instrument, the lessor, probably, covenants impliedly for the quiet enjoyment of the premises by the tenant (*Baynes v. Lloyd, supra*). The express covenant for quiet enjoyment usually to be met with in leases and agreements is limited, as is well known, to the acts of persons claiming through or under the lessor. The implied covenant to the like effect has usually been said to be wider in its scope and to extend to the acts of strangers (Platt on *Covenants*, p. 47). Whether that opinion is correct is now, however, doubtful (*Baynes v. Lloyd, supra*). But in either event the implied covenant for quiet enjoyment is limited to the lawful acts, as distinguished from the mere wrongful trespasses, of the persons who commit them (*Wallis v. Hands*, [1893] 2 Ch. 75, at p. 83). Nor is the covenant implied in favour of a party who has a mere *interesse termini* without possession (*id.*). In an agreement which has the effect of a present demise, a covenant will be implied on the part of the lessor to give immediate possession (*Coe v. Clay*, 1829, 5 Bing. 440).

A covenant for title is not implied in a demise by parol (*Bandy v. Cartwright*, 1853, 8 Ex. Rep. 913). Nor is it, probably, to be implied in a demise by deed (see *Baynes v. Lloyd, supra*), though in the face of several earlier decisions to the contrary the question cannot be regarded as settled. But, if it is to be implied at all, the covenant for title, like the covenant for quiet enjoyment, is only to be implied from the use of the particular word “demise” in the deed (*id.*), and the lessee cannot sue for damages if

he knew at the time of the defect of title on which he subsequently relies (*Gas Light Co. v. Towse*, 1887, 35 Ch. D. 519). Where, too, as in the case of taking an underlease, the lessee has constructive notice of his lessor's title imputed to him (see *Patman v. Harland*, 1881, 17 Ch. D. 353), the rule of *caveat emptor* will prevail to prevent him, in the absence of an express clause giving the right to compensation, from recovering for a loss he may sustain owing to a defect in that title (*Clayton v. Leech*, 1889, 41 Ch. D. 103). Where, again, a person agrees to let premises at a future date he impliedly undertakes that he will have a good title to let at that date (*Stranks v. St. John*, 1867, L. R. 2 C. P. 376, explained by Lord Russell, L.C.J., in *Baynes v. Lloyd*, [1895] 1 Q. B. 820).

Subject to what has just been stated, and subject to two exceptions to be presently mentioned, the implied covenants on the part of the lessor are exhausted. He is, in particular, under no obligation with regard to the condition of the premises which are the subject of demise, though it should be pointed out that if he own adjoining property he is under an implied obligation to abstain from any act thereon which may cause damage to the demised premises, such obligation being based on the ground that he may not derogate from his own grant (*Aldin v. Latimer & Clark*, [1894] 2 Ch. 457; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836). He is in no way bound to do repairs to them (*Gott v. Gandy*, 1853, 2 El. & Bl. 845), or to support them (*Colebeck v. Girdlers Co.*, 1876, 1 Q. B. D. 234), or to guarantee their endurance during the term (see *Arden v. Pullen*, 1842, 10 Mee. & W. 321), or to rebuild them in the event of their being destroyed by fire (*Bayne v. Walker*, 1815, 3 Dow, 233; 15 R. R. 53); and this in spite of an express covenant on his part for quiet enjoyment of them by the tenant (*Brown v. Quilter*, 1764, Aub. 619). And it has on many occasions been expressly decided that when premises are taken for the purpose of occupation, no covenant will be implied on the part of the lessor that they are fit for that purpose (*Hart v. Windsor*, 1843, 12 Mee. & W. 68). To this, however, there is both a statutory and a common law exception. The statutory exception is contained in the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70). See ARTISANS, vol. i. p. 340. The common law exception is in the well-known case of furnished houses or APARTMENTS. See vol. i. p. 265.

On the part of the lessee the only covenant that will be implied—and that, as in the case of the lessor, only in the absence of an express covenant covering the same ground—is a covenant to treat the demised premises in a tenant-like manner. This, in the case where the subject of demise is a house or houses, involves beyond question the doing of certain repairs. The *quantum*, however, of the tenant's liability under this head has not been precisely defined; and except in contradistinction to certain stereotyped expressions used in express covenants, such as "substantial repair" or "good tenantable repair," the Courts have not attempted to determine the extent of the implied obligation to use premises "in a husband-like manner," as suggested in *Horsefall v. Mather*, 1815, Holt N. P. 7; 17 R. R. 589. In the case where the subject of demise is agricultural property, the implied covenant, in addition to requiring the tenant to maintain the fences and hedges (see *Cheetham v. Hampson*, 1791, 4 T. R. 318; 2 R. R. 397), is one to cultivate in a proper manner in accordance with the custom of the country. In conformity with established rule, all agricultural leases import the custom of the district where the premises are situated, unless the terms of the document either expressly exclude it or are directly inconsistent with it (*Wigglesworth v. Dallison*, 1779, 1 Doug.

201; *Hutton v. Warren*, 1836, 1 Mee. & W. 466; *Tucker v. Linger*, 1883, 8 App. Cas. 508). A custom, however, to be thus imported must be certain (though not necessarily absolutely uniform—*Legh v. Hewitt*, 1803, 4 East, 154; 7 R. R. 545), reasonable, and of reasonable standing (*Tucker v. Linger, supra*), and publicly observed throughout the district (*id.*); for the mere practice of tenants on a particular estate or property is not a custom in this sense (*Womersley v. Dally*, 1857, 26 L. J. Ex. 219). The covenant in question, founded upon the custom of the country, will be implied whatever be the mode in which the tenancy has its origin, whether by deed (*Wigglesworth v. Dallison, supra*) or by parol (*Wilkins v. Wood*, 1848, 17 L. J. Q. B. 319). Where the tenant owns land immediately adjoining the land under demise to him, a covenant will be implied on his part to preserve the boundaries of the latter so as to keep it throughout the term distinct from the former (*Spike v. Harding*, 1878, 7 Ch. D. 871).

(ii.) *Usual Covenants*.—It might, one would think, fairly be supposed that covenants which are contained (say) in the great majority of leases and agreements of dwelling-houses, business premises, and farms would have been called “usual covenants”; and it is not apparently unreasonable to surmise that the word “usual,” which at the present time when applied to covenants is a word of art or strict legal signification, was originally intended to include the covenants most commonly met with in those leases. Usual covenants have, however, whatever the literary origin of the term, become practically stereotyped.

The legal significance of the word “usual” becomes important in two cases: (1) where an agreement to take a lease containing “usual covenants,” or to take a lease without reference to covenants at all, has to be construed; (2) where upon the creation or assignment of an underlease the question is raised of the extent to which the underlessee or assignee is bound by covenants in the head lease.

The general rule is that, where a person enters into an agreement to take a lease *simpliciter*, he is only liable to “usual” covenants; and where he agrees to take an underlease, whether directly from a lessee, or by purchase or assignment from another underlessee, he is only bound by usual covenants in the head lease, unless he has had notice, express or constructive, of the covenants of that lease (*In re Lander and Bagley's Contract*, [1892] 3 Ch. 41; *Hyde v. Warden*, 1877, 3 Ex. D. 72; *Reeve v. Berridge*, 1888, 20 Q. B. D. 523; *In re White and Smith's Contract*, [1896] 1 Ch. 637).

The construction placed by the Courts upon the word “usual” shows that its meaning in law is more limited than in common language, although that meaning, it is stated, may vary in different generations, and should represent the actual knowledge of mankind as to what covenants are in ordinary language usual and what are not (see per Jessel, M. R., in *Hampshire v. Wickens*, 1878, 7 Ch. D. at p. 561). In spite, however, of this possible approximation of the legal to the common meaning of the word “usual,” no enlargement of the term has been recognised in law for many years. It may be safely stated as a fact that a qualified covenant not to assign without the licence of the lessor being first obtained is in ordinary language a most usual covenant in leases of lands and houses; yet, if we pass over two early decisions which may now be definitely regarded as overruled, it has not in ancient or modern times been recognised as “usual” within the legal meaning of that word (see *Hampshire v. Wickens, supra*; *Bishop v. Taylor*, 1891, 60 L. J. Q. B. 556; *In re Lander and Bagley's Contract*, [1892] 3 Ch. 41).

Part of evidence is, however, admissible to show that a covenant is "usual" in two cases: first, to prove a usage or custom of the place where the premises are situated, and, secondly, to establish the existence of "special circumstances," i.e. those peculiar to any special trade for which the premises may be taken. The question then, of course, becomes one of fact (see *Strelley v. Pearson*, 1880, 15 Ch. D. 113, where it is pointed out that a covenant in a mining lease might be a usual covenant in Scotland though not in Derbyshire). Subject, however, to the admissibility of such evidence when local or trade customs intervene, the judgment of Jessel, M. R., in *Hampshire v. Wickens*, *supra*, sets out all the covenants that are "usual" in leases, viz.: covenants by the lessee (1) to pay rent, (2) to pay taxes except such as are expressly payable by the landlord, (3) to keep and deliver up the premises in repair, and (4) to allow the lessor to enter and view the state of repair: and the usual qualified covenant by the lessor for quiet enjoyment by the lessee.

It has been attempted unsuccessfully to extend the word so as to make it embrace the ordinary covenants in restriction of trade (*Van v. Corpe*, 1834, 3 Myl. & K. 269; *Reere v. Berridge*, 1888, 20 Q. B. D. 523): a limitation of the lessee's covenant to repair in case of fire (*Sharp v. Milligan*, 1857, 23 Beav. 419); the right to determine a mining lease if the property cannot be worked at a profit (*Strelley v. Pearson*, *supra*); a covenant by the lessee to reside at, and personally superintend the business of, a public-house (*In re Lander and Bagley's Contract*, *supra*); and one to give the lessor a right of re-entry in the event of the lessee's bankruptcy or suffering execution (*Hyde v. Warden*, 1877, 3 Ex. D. 72). Indeed, it is now settled that the only covenant "usual" in this sense, that for the breach of it the lessor may exercise the right of re-entry or forfeiture, is the covenant to pay rent (*Hodgkinson v. Crowe*, 1875, L. R. 10 Ch. 622; *In re Anderton and Milner's Contract*, 1890, 45 Ch. D. 476); though here too the considerations already adverted to, of local custom and peculiar character of demised property, may have the effect of creating an exception to the rule (*Bennett v. Womack*, 1828, 7 Barn. & Cress. 627).

(iii.) *Covenants running with the land*.—Covenants running with the land are those covenants the benefit and burden of which are transferred from the immediate parties to the instrument of demise to those who claim under them by assignment; covenants which are merely personal to the parties who enter into them being known by contradistinction as collateral. The leading authority on this branch of law is the judgment of the King's Bench in *Spencer's case*, 1583, 5 Co. Rep. 16 a, from which we learn that the former include (a) all implied covenants (as to which, see *supra*), (b) all express covenants which extend to a thing *in esse* parcel of the demise, and even (c) those which relate to something touching the land, but not *in esse* at the time of the demise, provided that where the covenant is absolute in character (see *Minshull v. Oakes*, 1858, 2 H. & N. 793) assigns are expressly named therein (for a list of such covenants, see the notes to *Spencer's case* in 1 Sm. L. C. at pp. 65, 66, 10th ed.). To run with the land, covenants must either affect the land itself during the term, such as those which regard the mode of occupation, or they must be such as *per se*, and not merely from collateral circumstances, affect the value of the land at the end of the term (*Mayor of Conyngton v. Pattison*, 1808, 10 East, 130, at p. 138). Strictly, the doctrine of covenants running with the land applies only to leases which are under seal. But in the case of an instrument of demise not under seal, an assignee paying rent to the landlord may become clothed with rights and

liabilities just as if the covenants ran with the land, by the expedient of implying an agreement between the parties on exactly the same terms as in the original letting (*Buckworth v. Simpson*, 1835, 1 C. M. & R. 834; *Elliott v. Johnson*, 1866, L. R. 2 Q. B. 120).

At common law it was always said that covenants, though they might run with the land, did not run with the reversion; which meant that, though the assignee of the lessee could sue and be sued on such covenants, the assignee of the lessor could not. This, however, was remedied, and assignees of the lessor placed on the same footing (as regards rights of and liabilities to both action and re-entry) as assignees of the lessee, by the Statute 32 Hen. VIII. c. 34. This statute only applies to demises under seal; but upon the assignment of the reversion on a parol demise, an inference similar to the one just mentioned may be drawn from acts such as payment of rent indicating an intention to that effect, that an agreement has been arrived at between the tenant and the new reversioner to continue the tenancy on the same terms as before (*Smith v. Eggington*, 1874, L. R. 9 C. P. 145).

In order to enforce a covenant running with the land it is necessary to establish privity of estate between the parties; and the benefit of it and the burden under it are limited to the duration of that estate. Thus the lessor can maintain an action of covenant against the assignee of his lessee only for breaches which have occurred after such assignment; and the assignee is liable only during the time he remains assignee, and can at once put an end to all further liability by reassignment. Nor is it material that such reassignment be made by him for the express purpose of ridding himself of the liability, and to a person entirely destitute of means to bear it (*Taylor v. Shum*, 1797, 1 Bos. & Pul. 21; 4 R. R. 759). So, on the other hand, the assignee of the reversion can only sue the lessee for breaches of covenant which have occurred after he has obtained privity of estate by the assignment of the reversion to himself (*Johnson v. Churchwardens of Hereford*, 1836, 4 Ad. & E. 520). When a term or a reversion is "severed," it becomes important to consider the question how far the rights and obligations in covenants here treated of are capable of being divided or apportioned amongst the persons respectively entitled and liable. With regard to rent there is no difficulty. At common law rent was always apportionable in respect of estate; under the Apportionment Acts it is deemed to accrue *de die in diem*, and the amount can be ascertained exactly (see APPORTIONMENT). With regard to the covenant to repair, where the lessee assigned his interest in part of the demised premises, or a partial interest in the whole, the assignee at common law was liable in a degree commensurate with the interest he acquired (*Congham v. King*, 1630, Cro.(3) 221; *Merccron v. Dowson*, 1826, 5 Barn. & Cress. 479). So, on the other hand, upon an assignment of part of the lessor's reversion, or of his whole reversion in part of the premises, the covenant to repair was held to be apportionable and to run with the reversion (*Twynnam v. Pickard*, 1818, 2 Barn. & Ald. 105; 20 R. R. 368). And now by the Conveyancing Act (44 & 45 Vict. c. 41), as regards leases made after the year 1881, the benefit of every covenant by the lessee having reference to the subject-matter of the demise is to run with the reversion, notwithstanding severance, and to be enforceable by the person from time to time entitled to the income of the whole or any part of the land leased (s. 10). On the other hand, the obligation of every covenant by the lessor having reference to the subject-matter of the demise is, so far as he has power to bind the reversionary estate, to run

with that reversion, notwithstanding severance, and to be enforceable by the person in whom the term is from time to time vested (s. 11).

Collateral covenants, as already stated, are covenants of a character merely personal to the covenantor, and, as regards these, assignees have, *prima facie*, no concern; they confer no rights and impose no obligations upon them. Moreover, that such covenants should expressly extend to assignees is quite immaterial (*Spencer's case*, 5 Co. Rep. 16 a, 2nd resolution). It does not, however, by any means follow that assignees can disregard them; but their enforcement does not depend, like the enforcement of covenants running with the land, upon privity of estate, but upon rights created or recognised by equity under certain circumstances. The right attaches in favour of the person, or the assigns of the person, for whose benefit the covenant sought to be enforced was entered into, against the person (or his assigns) who took the premises with notice, express or constructive, of the covenant; the doctrine having for its basis the principle that, if an equity is attached to property by the owner, no purchaser having notice of that equity can stand in a different situation from the party from whom he purchased (*Tulk v. Moxhay*, 1848, 2 Ph. Ch. 774). Inasmuch, however, as the remedy is equitable, and equity declines to give relief by way of specific performance where work of a constructive nature (e.g. building or repairing) has to be done, only covenants of a negative character (*Austerberry v. Corporation of Oldham*, 1885, 29 Ch. D. 750), as distinguished from those which entail the expenditure of money (*Haywood v. Brunswick Building Society*, 1881, 8 Q. B. D. 403), can be thus enforced (see also *Clegg v. Hands*, 1890, 44 Ch. D. 503). Practically speaking, the class of collateral covenants which are enforceable against a person taking premises with notice are those which in some way or other restrict the user of the premises; and these covenants will be found dealt with generally under the next head. The constructive notice already alluded to as sufficient to entail liability extends to all covenants contained in deeds which, in the case of a person acquiring a leasehold interest in premises, form part of the chain of title of his assignor or lessor (*Patman v. Harland*, 1881, 17 Ch. D. 353); for every person acquiring such an interest is bound to make a reasonable investigation of title (*id.*, per Jessel, M. R.). In such a case even an express representation by the assignor or lessor denying the existence of the restrictive covenant will not absolve the assignee or lessee (*id.*).

Perhaps the whole result may be shortly summed up by saying that, while the parties to an instrument of demise can of course sue and be sued on all covenants, assigns can sue and be sued on all covenants running with the land, and if they have notice, actual or constructive, of a restriction may be prevented from disregarding the restriction.

(iv.) *Restrictive Covenants*.—Restrictive covenants may be divided into two classes, in accordance with the object of the restriction—(a) covenants restricting the alienation of the property, i.e. not to assign or underlet, or part with the possession of the demised premises; (b) covenants restricting the use and enjoyment of the subject-matter. It may be stated generally with regard to all purely restrictive covenants that the Courts will enforce the prohibition by injunction, and, as has been previously explained, the equitable doctrine of notice makes the person taking property subject to a restrictive covenant liable without either privity of contract or of estate to the person (or his successor in title) in whose favour the restrictive covenant was made.

(a) *Covenant not to assign or underlet or part with possession*.—This

covenant, as has been pointed out, is not technically a "usual" covenant, although almost every lease contains it in one form or another. The covenant is either absolute, not to assign without the consent (usually the written consent) of the lessor—or qualified, not to assign without the consent of the lessor, provided that such consent shall not be arbitrarily or unreasonably withheld—or provided such consent shall not be withheld from a respectable or responsible person. Under the absolute covenant the lessor has an unqualified right of refusal, though he is now prevented from directly selling his consent by the provisions of 55 & 56 Vict. c. 13, s. 3; but where the covenant is qualified the lessor has to prove cogently that his refusal is justifiable (*Sheppard v. Hong Kong Banking Corporation*, 1872, 20 W. R. 459); and if this be not the case the lessee, though he cannot bring an action to compel the lessor to give his consent, may assign without committing a breach of his covenant (*Treloar v. Bigge*, 1874, L. R. 9 Ex. 151; *Hyde v. Warden*, 1877, 3 Ex. D. 72). The lessor's consent should in every case be first applied for or a breach will be committed (*Barrow v. Isaacs*, [1891] 1 Q. B. 417).

Where it is stipulated that the lessor's consent shall not be unreasonably withheld in the case of a responsible tenant, the Court has to decide upon the facts whether the lessor has acted reasonably or not. It is impossible to lay down any precise rule on this question. Kay, L.J., in *Bates v. Donaldson*, [1896] 2 Q. B. 241, suggests that there may be reasons personal to the landlord which might entitle him to refuse; while A. L. Smith, L.J., seems to limit the reasons to the protection of the lessor against having his premises used or occupied in an undesirable way or by an undesirable tenant.

In order to establish the breach it is necessary to prove that a valid assignment has been executed (*Doe v. Powell*, 1826, 5 Barn. & Cress. 308). Unless expressly prohibited, alienation by specific devise (*Fox v. Swann*, 1655, Sty. 482) or a mere equitable deposit of the title-deeds (*Doe v. Hogg*, 1824, 4 Dow. & Ry. 226; 27 R. R. 512) is not sufficient. The meaning of the covenant by the lessee not to assign is not to assign of his free will, and therefore assignment by operation of law on bankruptcy is not a breach (*Wadham v. Marlow*, 1784, 4 Doug. 54; 9 R. R. 456; *Doe v. Beran*, 1815, 3 M. & S. 353; 16 R. R. 293), nor where the sheriff sells the term under an execution (*Doe v. Carter*, 1799, 8 T. R. 57; 4 R. R. 586), nor if the term be purchased under compulsory powers by a public company (*Slipper v. Tottenham, etc.*, Ry. Co., 1867, L. R. 4 Eq. 112). Underletting the premises demised is not prevented by a mere covenant not to assign (*Crusoe v. Bugby*, 1770, 2 Black. W. 766); unless it extend to "any part" of the term (*Doe v. Worsley*, 1807, 1 Camp. 20); but as an assignment is in effect an underlease of the whole term, on a covenant not to underlet the tenant is prevented from assigning (*Timms v. Baker*, 1883, 49 L. T. 106). The letting of lodgings or furnished apartments is a breach of a covenant not to let any part of the premises (*Roe v. Sales*, 1813, 1 M. & S. 297), at all events in the case where possession by the tenant of the part so let is exclusive.

Where the covenant is not to part with the possession of the premises, a breach is committed if the tenant permits other persons (*Corporation of Bristol v. Westcott*, 1879, 12 Ch. D. 461) to occupy a substantial part thereof; but the mere temporary parting with possession of a small portion of the property would probably not be held to amount to a breach (see *Mashiter v. Smith*, 1887, 3 T. L. R. 673). To constitute a breach the landlord must, moreover, show that the possession has been parted with by the tenant; for possession consistent with a mere trespass will not be sufficient

(*Doe v. Payne*, 1815, 1 Stark. 86; 18 R. R. 747). Nor will it suffice merely to show that other persons have been let into possession without showing also that the tenant has failed to retain possession himself (*Peebles v. Crosthwaite*, 1897, 13 T. L. R. 198).

(b) *Restrictions as to the user and enjoyment of property* originate in nearly every instance in a covenant by the lessee, either affirmatively to use the premises for the purpose of a particular trade or trades, or as a private residence, or negatively not to carry on any trade, or not to carry on certain trades therein. The prohibition is sometimes qualified by the stipulation that if the lessor give a licence for the purpose (usually in writing) the lessee shall be entitled to carry on trade generally or a particular trade or business (*Bramwell v. Lacy*, 1879, 10 Ch. D. 691; *Tritton v. Bankart*, 1887, 56 L. T. 306); but in the latter event such licence will not extend to the carrying on of any trade other than the one expressly permitted (*Macher v. Foundling Hospital*, 1813, 1 Ves. & Ben. 188). It is impossible, within the prescribed limits, to deal individually with the very numerous forms of these covenants in leases relating to trade, and the mass of authorities where particular covenants have received judicial interpretation. Perhaps the most ordinary covenant of this class is the one prohibiting the lessee from carrying on any trade or business, and the more stringent covenant, affirmative in form though negative in substance, to use the premises as a private residence only. It has been decided that, unlike the word "trade," which imports buying and selling (*Doe v. Bird*, 1834, 2 Ad. & E. 161), the word "business" is of very wide meaning, and will cover, for instance, a school (*Doe v. Keeling*, 1813, 1 M. & S. 95; 14 R. R. 405), or a "home" supported by charitable subscriptions (*Rolls v. Miller*, 1884, 27 Ch. D. 71). The difficulty, however, that usually arises in respect to an alleged infringement of these covenants, is whether the acts complained of amount to the carrying on of a business or the user of the premises for that purpose; for it is obvious that an isolated act would not amount to the carrying on of business, and in such case it is a question of degree (see per Jessel, M. R., in *Portman v. Home Hospital Association*, 1879, 27 Ch. D. 81, n.).

With reference to user of the premises, the above-mentioned covenants are the most restrictive covenants in general use, for they prohibit *all* trade or business. Where, however, the prohibition is limited to "noisome" or "offensive" trades, it tacitly permits the user of the premises for trades which are not within that category (*Bonnett v. Sadler*, 1808, 14 Ves. 526; 9 R. R. 341). A covenant in the conveyance of a plot of land laid out for building, not to carry on any trade which might be "injurious" to the land, has been held not to extend to a trade which was only indirectly injurious by reason of a tendency to diminish the general character of the land for residential purposes (*Knight v. Simmonds*, [1896] 1 Ch. 653). The covenant now in question is not unfrequently followed by a more general covenant, stipulating that the lessee will not do or permit acts to the annoyance of the lessor or the neighbours, the neighbours here spoken of not being necessarily persons claiming under the lessor (*Tod-Heatly v. Benham*, *infra*). The combined effect of these two covenants is to prevent the lessee from carrying on trades within the definition, and further from making such use of the premises apart from the incidents of trade as to interfere with the reasonable comfort of the neighbours (*Tod-Heatly v. Benham*, 1888, 40 Ch. D. 80). Both questions, namely, whether a trade is noisome or offensive, and whether the acts complained of do amount to an interference with the comfort reasonably expected by the neighbours, are questions of



fact depending principally upon the character of the locality and the previous use to which the premises and those adjoining have been put (see *Gutteridge v. Munyard*, 1834, 7 Car. & P. 129). The fact of a trade being dangerous is not conclusive that it is offensive (*Hickman v. Isaacs*, 1861, 4 L. T. 285; compare with this case *Lepla v. Rogers*, [1893] 1 Q. B. 31); but proof that the user of premises, e.g. as an hospital, renders the adjoining owners liable to risk—or to the apprehension of risk—of infection, has been held to amount to an “annoyance or grievance” within the meaning of a covenant containing these words (*Tod-Heatly v. Benham*, *supra*). It has been decided that the term “nuisance” in these covenants meant what is known as a legal nuisance (*Harrison v. Good*, 1871, L. R. 11 Eq. 338); but this decision has been seriously questioned, and cannot now be relied upon (*Tod-Heatly v. Benham*, *supra*). Sometimes the covenant is formulated in less sweeping terms, as a prohibition against particular or specified trades, e.g. the business of a common brewer or of a licensed victualler or keeper of a restaurant, or a covenant not to use the premises as a beer-house or as a public-house. This covenant, of course, implies that trades other than those mentioned are not forbidden but sanctioned. Where the words defining the trade have acquired a technical meaning, as in the case of a public-house, little difficulty arises in deciding whether a breach has been committed. Where, however, as often happens, the trade prohibited has attributes in common with trades which are not prohibited, the Court has to decide upon all the circumstances, whether in fact there has been a substantial infringement of the covenant (*Stuart v. Diplock*, 1889, 43 Ch. D. 343; *Buckle v. Fredericks*, 1890, 44 Ch. D. 244; *Fitz v. Iles*, [1893] 1 Ch. 77). The construction of these covenants, as indeed of all restrictive covenants, tends to strictness (see *German v. Chapman*, 1877, 7 Ch. D. 271), and the Court declares the effect of the covenant according to the meaning of the words used at the time the covenant was made (see *London and North-Western Ry. Co. v. Garnett*, 1869, L. R. 9 Eq. 26; *Jones v. Bone*, 1870, L. R. 9 Eq. 674). The covenant not unfrequently contains a prohibition against other trades “similar to” those expressly prohibited. Where these words are added, the ordinary rule that general words following special words are to be construed as being *ejusdem generis* applies. The test in such cases is whether the business alleged to be similar substantially competes with the business sought to be protected by the prohibition (*Drew v. Guy*, [1894] 3 Ch. 25).

Of a somewhat analogous character to the covenant prohibiting specified trades is the affirmative covenant to carry on a specified trade. The mere demise of premises as trading premises of a particular character—the mere description of them, for instance, as a hotel—does not create an implied covenant by the lessee to carry on that trade in them (*Grand Canal Co. v. McNamee*, 1891, 29 L. R. Ir. 131); nor will a negative covenant to carry on no trade other than a specified trade create an implied affirmative covenant to carry on the particular trade excluded from the prohibition (*Doe v. Guest*, 1846, 15 Mee. & W. 160).

The Court, moreover, will neither directly by mandatory injunction compel the performance of an affirmative covenant to carry on a particular trade, nor indirectly by restraining the covenantor from breaking his undertaking to do so (*Hooper v. Brodrick*, 1840, 11 Sim. 47). Covenants as to carrying on particular trades are most usual in the leases of licensed premises, and are not unfrequently strengthened by a covenant not to do or suffer any act whereby the licence may be jeopardised (*Wooler v. Knott*, 1876, 1 Ex. D. 124; *Flectwood v. Hull*, 1889, 23 Q. B. D. 35; *Harmann*

*v. Powell*, 1891, 60 L. J. Q. B. 628). What are called "tied houses" in the trade are licensed houses let by brewers to lessees containing a covenant to purchase all beer required from the lessors. There is in such covenant an implied undertaking on behalf of the lessors to supply beer of good marketable quality (*Luker v. Dennis*, 1877, 7 Ch. D. 227), and so long as this is done the covenant can be enforced against the lessee (*Edwick v. Hawkes*, 1881, 18 Ch. D. 199; *Hanbury v. Cundy*, 1887, 58 L. T. 155; *Clegg v. Hands*, 1890, 44 Ch. D. 503).

In addition to the restrictions as regards trade, other restrictions not relating to the user of the subject-matter, but referring rather to the maintenance *in statu quo* of the structure, are often met with in demises.

Covenants restraining the alteration of or addition to the structure or the alteration of the character of the demised premises are chiefly of importance when land is being built upon under a building scheme. When the owner of the land retains the reversion the consideration of such covenants properly falls within the purview of covenants between landlord and tenant; but where the plots are sold subject to restrictive covenants the question properly belongs to the law of vendor and purchaser. (See SALE; VENDOR AND PURCHASER.)

It may be stated as a general rule that such covenants do not enure for the benefit of one tenant or purchaser against another, unless the right to enforce them be either given him expressly, or it appear from all the circumstances that it was intended that he should have it; as, for instance, where different plots of land are sold or let as part of the same building scheme, the covenants in question being imposed for the common advantage of the tenants or purchasers (*Nottingham Patent Brick Co. v. Butler*, 1886, 16 Q. B. D. 778; *Spicer v. Martin*, 1888, 14 App. Cas. 12; *Davis v. Corporation of Leicester*, [1894] 2 Ch. 208). Where, on the other hand, the covenants are obviously imposed, not for the advantage of the tenants, but merely for the protection of the lessor, the tenants or purchasers cannot enforce them *inter se*; and the fact of the lessor reserving a portion of the land for himself is evidence, though not conclusive evidence, of this being the case (*In re Birmingham, etc., Land Co.*, [1893] 1 Ch. 342).

In any case the right to enforce a covenant of this kind may be lost by acquiescence in the acts of a party who is alleged to have infringed it. Where the acts in question are those of the defendant himself, if the breach complained of be one definite act, *e.g.* building an addition to the premises in contravention of the covenant, the lessor can enforce the covenant, subject only to the Statute of Limitations, unless he knew antecedently of the proposed breach and stood by allowing the lessee to expend money without interference (*London, Chatham, and Dover Ry. Co. v. Bull*, 1882, 47 L. T. 413). If, however, the breach is a continuing breach, *e.g.* not to use the premises for a certain trade, and the lessor, after knowledge thereof, stands by, he may lose his right to interfere independently of the Statute of Limitations upon the purely equitable doctrine of acquiescence (*Sayers v. Collyer*, 1888, 28 Ch. D. 103).

When the acts in question are those of a person or persons other than the defendant, the lessor or adjoining lessees are entitled to an injunction • restraining breaches of the restrictive covenants, unless it be proved that the breaches complained of have been committed without interference to such an extent as to substantially change the character of the property, and thereby tacitly put an end to the object of the covenant (*Duke of Bedford v. British Museum*, 1822, 2 Myl. & K. 552). For when equities

have to be regarded it becomes right to look, not merely at the wording of the covenant, but at the real object it was inserted in the conveyance to attain (*Knight v. Simmonds*, [1896] 2 Ch. 294). The mere fact, consequently, that breaches have been committed will not prevent relief from being given, if by comparison with the breaches complained of those previously committed are small and unimportant (*Western v. MacDermott*, 1866, L. R. 2 Ch. 72).

[*Authorities*.—See Woodfall on *Landlord and Tenant*; Foà on *Landlord and Tenant*, 2nd ed.]

**Cover.**—A word frequently employed in connection with transactions relating to the buying and selling of stocks and shares. As ordinarily used, it simply means a security against loss (see *Mundella v. Shaw*, 1888, 4 T. L. R. 456).

**Coverture.**—At common law, husband and wife become one person. As Blackstone expresses it, "The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything, and is therefore called in our law—French a *feme-covert* . . . and her condition during her marriage is called her *coverture*." During the marriage the husband was entitled to the rents and profits of his wife's realty, and he could alienate the same for so long as his own interest might continue. Without his concurrence the wife's realty could not be conveyed. Further, he was entitled to her chattels real, her choses in possession, and, when reduced into possession, her choses in action. Moreover, a married woman could not in general enter into contracts, except for necessities, nor could she sue or be sued. In criminal law, too, in the case of certain offences committed by a married woman in the presence of her husband, the presumption was, and still is, that she acted under his coercion (*q.v.*).

The introduction of trusts for the separate use of a married woman, and the insistence by the Court of Equity in many cases of an adequate settlement being made by the husband out of his wife's property in her favour, largely modified the operation of the old common law. Now, by the Married Women's Property Acts, a married woman is practically in the same position as a *feme sole*. See HUSBAND AND WIFE.

**Covin (Convenium)** is a term now obsolete in law, meaning a secret contrivance or collusion between two or more persons to defraud or prejudice another of his rights (Co. Lit. 357 *b*; Vin. Abr. *s.v.*; Com. Dig. *s.v.*). What was called covin is now described as fraud, collusion, or conspiracy to cheat and defraud.

The word "covinous" survives in the Fraudulent Conveyances Acts of 1571 (13 Eliz. c. 5) and 1584 (27 Eliz. c. 4), where see Chit. Stat., 5th ed., vol. ii., tit. "Conveyancing," 11–23, 136.

**Crabs and Lobsters.**—By the Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), which applies to all the British Islands, provision is made for the protection of crabs and lobsters. The Act

forbids (s. 8) taking, possessing, selling, or exposing, consigning, or buying for sale edible crabs which (1) are less than 4½ inches across the broadest part of the back, (2) are carrying spawn, (3) have recently cast their shell (s. 8). The prohibition does not apply to the use of small edible crabs for bait. A like prohibition applies to the taking, etc., of lobsters less than 8 inches long (s. 9).

The maximum penalty for a first offence is £2; for a second or subsequent offence, £10; and the offender is also liable to forfeit all crabs or lobsters in his possession contrary to the Act. The penalty and forfeitures are enforceable under the Summary Jurisdiction Acts (s. 11), and powers of search and seizure are given by sec. 12. The Board of Trade may also, after public inquiry held after due notice, prohibit or restrict the taking of crabs or lobsters in a particular area; but the order does not apply to a several right of fishery (s. 10). The Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), which provides for the creation of sea-fishery districts and local committees, empowers a local committee to make by-laws to prevent the use of undersized crabs for bait (s. 2 (1) (c)), or repealing or amending a Board of Trade order under sec. 10 of the Act of 1877.

Under the Sea Fisheries Act, 1891 (54 & 55 Vict. c. 37, s. 9), the local committee is empowered to enforce the provisions of the Act of 1877, including the power of search and seizure; and by the Sea Fisheries Shell-fish Regulation Act, 1894 (57 & 58 Vict. c. 26), they are given extended powers of making by-laws for the regulation, protection, and development of fisheries, *inter alia*, for crabs and lobsters. See FISHERY.

**Craft.**—In *Reed v. Ingham*, 1854, 3 El. & Bl. 889, the term “craft,” in the phrase “wherry, lighter, or other craft,” was held not to include a steam tug of eighty-seven tons burden.

**Cranage** is defined as (1) a liberty to use a crane for landing goods from vessels on a wharf and make profit of it; (2) a toll paid for the same (Wharton, *Dictionary*; Bouvier, *Dictionary*).

**Crave leave to refer.**—This is a phrase which is still frequently used in pleadings—an unfortunate survival from a former system. Under Order 31, r. 15, any party to an action is now entitled to inspect and copy any document to which his opponent refers in his pleading. Hence it is wholly unnecessary for him to “crave leave” to refer to that which he is entitled as of right to inspect at once. If the plaintiff in his statement of claim sets out the terms of a material document correctly, the defendant should admit that they are correctly set out, adding such other portions as he himself relies on. If the plaintiff sets out the terms incorrectly, the defendant should set them out correctly. If the plaintiff does not set the terms out at all, but merely states shortly the effect of the document, the defendant should either admit or deny the correctness of the plaintiff’s version; and in the latter case it is generally advisable for the defendant to set out what he alleges to be the effect of the document.

**Creamer.**—An old name for a pedlar or huckster.

**Credit.**—As to offences in regard to, under the Debtors and Bankruptcy Acts, see BANKRUPTCY, vol. I. p. 522.

**Cremation.**—This method of disposing of dead bodies has always been much used in the East; but in Europe it seems to be opposed to the instincts of most people, and certainly has never been generally adopted. There is, however, no doubt that, apart from sentimental considerations, it is, from a purely sanitary point of view, preferable to interment. Sanitary reformers have for some time advocated its adoption in this country, but the general opinion was that it was illegal, and, consequently, cremations seldom or never took place. A case, however, came before Mr. Justice Stephen, who decided that, if conducted in such a way as not to offend public feeling or prevent proper investigation being made as to the cause of death, cremation is not illegal (*R. v. Price*, 1883, 12 Q. B. D. 247). Since that decision, crematories have been started, and those who desire to set an example of disposing of the dead in such a manner as to prevent the danger of their poisoning the living, can cremate them. The conditions under which the rite can be practised with safety are, however, uncertain, as Parliament has hitherto refused to pass any statute for regulating cremation, for fear of giving to the practice a positive sanction in the place of the purely negative sanction given by the above decision. The law must, for the present, be considered as unsettled.

There is legally no property in a corpse. A direction by will that the body of the testator is to be given to any particular person for the purpose of being cremated is inoperative; and it has consequently been held that a friend, who incurred considerable expense in carrying out such a direction, could not recover from the executors the amount so expended (*Williams v. Williams*, 1882, 20 Ch. D. 659). The Courts, however, desire always to give effect to the wishes of the deceased, as to the disposal of his body, and would consequently now give effect to such a direction, if applied for soon after the decease and before the body had been buried. But when a body has once been interred in any place of burial it is unlawful to remove it without the licence of a Secretary of State, or a faculty from the bishop of the diocese (20 & 21 Vict. c. 81, s. 25). When, therefore, a faculty to allow the removal of a body for the purpose of its being cremated was applied for, many years after the interment, the Consistory Court refused to grant it, and laid down, as a general rule, that when burial in consecrated ground and cremation are both desired, cremation should precede and not follow burial (*In re Digon*, [1892] Prob. 386). The Home Secretary would probably act on a similar rule, if applied to for his licence.

**Crest.**—See ARMORIAL BEARINGS.

**Crew.**—The “crew” of a ship generally means the whole ship’s company except the master, *i.e.* the mate or mates who are next in authority after the master, the carpenter, carpenter’s mate, boatswain, sailmaker, steward, cook, and the able and ordinary seamen and boys, and, in the case of a steamship, the engineers and firemen (Maude and Pollock, *Shipping*, i. 162; Kay, *Shipping*, 465). It is used in this sense in the Merchant Shipping Act, 1894, except as regards the list of the crew (see below), in which the master and apprentices are expressly included (s. 253); and includes appren-

tices (s. 240 (7)), thus having a wider meaning than the word "seamen" in that Act, which does not include a master, pilot, or apprentice (s. 742). The present article treats of the rights and duties of a ship's company as a collective body, leaving their individual rights and duties to be dealt with under SEAMAN.

Since 1853, British ships may be manned by persons of any nationality.

For the purposes of a policy of insurance or a contract of sea carriage, a shipowner is bound to provide a sufficient and skilled crew for the voyage; or the ship is not seaworthy (Lord Tenterden, *Clifford v. Hunter*, 1827, Moo. & M. 103; and *Steel v. State Line*, 1877, 3 App. Cas. 72). A shipowner is also responsible for all neglects and defaults of the crew during the voyage or navigation, either in tort (e.g. collision) or under his contract of sea carriage (e.g. bill of lading); and in this latter case he is liable, even though the loss is primarily caused by a peril excepted in the contract, if except for negligence on the part of the crew the loss would not have happened; while in the like circumstances he can recover under a policy of insurance (see MARINE INSURANCE). But he may so frame his contract as to relieve himself from liability for the negligence of the crew (*Gilroy v. Price*, [1893] App. Cas. 56). See BILLS OF LADING. A shipowner is liable to other persons, if from not having a sufficient crew for the care and navigation of his ship he does injury to them or their property (*The Excelsior*, 1868, L. R. 2 Ad. & Ec. 268, Sir R. Phillimore). In the case of an emigrant ship, the Merchant Shipping Act makes it compulsory for her to be manned with an efficient crew for her intended voyage to the satisfaction of the emigration officer, who is asked to give her a certificate of clearance; and after the crew has been passed by him, its strength must not be diminished nor any of the men changed without the written consent of either him or the superintendent at the port of clearance. If the latter gives his consent, it must be lodged within twenty-four hours with the emigration officer; if the latter thinks the crew inefficient, an appeal in writing lies from his decision to the Board of Trade (q.v.); and the unanimous written opinion of two other emigration officers or other competent persons appointed by the Board is conclusive. For any breach of this section a penalty up to £50 is imposed on the master (M. S. A., s. 305).

The rights of the crew are safeguarded by provisions of the Merchant Shipping Act dealing with their engagement, treatment, and discharge; and the form of the first of these has been the subject of legislation and judicial decision for a long time back. The earliest statute on the subject seems to have been in 1729 (2 Geo. II. c. 36), which provided that in mariners' contracts of service both the amount of wages and the voyage were to be specified; but in 1687 a by-law of the Trinity House, approved by Lord Chancellor Jeffries, had already provided that "every commander of a ship hiring any mariner, or seaman to sail with him on any voyage to sea do take in writing under the seaman's hand upon what condition he is entertained, and doth submit himself to the by-laws of the Trinity House." Succeeding Acts (31 Geo. III. c. 39, 1791; 5 & 6 Will. IV. c. 19, 1835; 13 & 14 Vict. c. 93, 1850) and the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104) similarly provided that a written agreement (commonly called the "ship's articles") should be necessary, specifying the wages to be paid, the capacity in which the seaman was to act, and the nature of the intended voyage; and the present law only reaffirms their effect.

The master of every ship, except coasters of less than 80 tons register, must enter into an agreement (called the agreement with the crew) with

every seaman whom he takes to sea from any part in the United Kingdom under penalty; this agreement must be in a form approved by the Board of Trade (given in Maude and Pollock, ii. 394 and 400), and dated at the time of the first signature thereof, and signed by the master (whether he be the owner's master or the charterer's makes no difference, *In re Great Eastern S.S. Co.*, 1885, 5 Asp. 511), and must contain either the nature, and, as far as practicable, the duration of the intended voyage or engagement, or the maximum period thereof, and the places and parts of the world, if any, to which the voyage or engagement is not to extend (for decisions as to the "nature" of voyages under the old Acts, see *The Countess of Harcourt*, 1824, 1 Hag. Adm. 248; *The Minerva*, 1825, *ibid.* 347; *The George Home*, *ibid.* 370; *The Westmoreland*, 1841, 1 Rob. W. 228; *Fraser v. Hutton*, 1857, 2 C. B. N. S. 512); the number and description of the crew, and how many go as sailors; the time at which their work is to begin or they are to be on board; the capacity in which each man is to serve, and the wages and provisions he is to receive; any regulations as to conduct and fines, short allowance of provisions or other lawful punishment for misconduct, approved by the Board of Trade and agreed to by the parties, and any stipulations not contrary to law which may be adopted in any particular case, whether respecting the advance or allotment of wages or otherwise. The agreement need not be in the Board of Trade form if the master of a ship, registered out of the United Kingdom, has an agreement with the crew made in due form according to the law of the port where they are engaged, and engages single seamen in the United Kingdom (ss. 113, 114).

In the case of agreements with the crews of foreign-going ships the agreement must be signed by each seaman in the presence of a mercantile superintendent, who has it read over and explained to them, and attests each signature; the agreement is signed in duplicate, the superintendent keeping one part and the master the other. If a substitute is engaged in place of a man who has duly signed the agreement, and whose services are lost by death, desertion, or some other unforeseen cause, if the engagement cannot be made before the superintendent, the master must, before the ship puts to sea, or as soon after as possible, have the agreement read over and explained to the substitute, who must sign it before an attesting witness. Such agreements may be made for a voyage, or if the ship's voyages average less than six months, then for two or more voyages; and, in the latter case, they are called running agreements. Running agreements must not extend beyond the next following 30th of June or 31st of December, or the ship's first arrival at her port of destination in the United Kingdom after that date, or the discharge of cargo consequent on such arrival. On every return to a port in the United Kingdom before a running agreement is finally determined, the master must indorse on the agreement any engagement or discharge of seamen which has been made, or is to be made, before the ship leaves port, and then deliver it to the superintendent, who is to sign it and return it to him. Duplicates of running agreements are either sent by the superintendent to the Registry of Shipping, or kept till the end of the agreement, as the Board of Trade directs (s. 115).

In the case of agreements with the crew of home trade ships, agreements may be made for service in a particular ship, or in two or more ships of the same owner, but in the latter case their names must be specified in the agreement. Crews or single seamen may, but need not, be engaged before a superintendent; but, if they are not, the master must have the agreement read and explained to them. If the agreement is one for service in two or more ships of the same owner, the owner may make it instead of the master.

The limit of time of service is the same in this case as in the case of foreign-going ships, except that the owner may enter into time agreements with individual seamen in forms approved by the Board of Trade, which need not expire at the ordinary times; duplicates of which must be sent to the Registrar-General of Shipping within forty-eight hours of their making (s. 116).

In the case of foreign-going ships, changes in their crew must be reported by the master, before the ship finally leaves the United Kingdom, to the nearest superintendent, under penalty (s. 117). On the due execution of the agreement, a certificate is granted by the superintendent to the master, without the production of which the customs officer may detain the ship from proceeding to sea; and, on the ship's arrival at her final port of destination in the United Kingdom, unless a certificate from the superintendent be produced that the agreement with the crew has been delivered to him by the master, the customs officer will not clear the ship inwards, and the master is liable to a penalty for not so delivering it (s. 118).

In the case of home trade ships of more than 80 tons burden, the master must send to the superintendent within twenty-one days of the 30th of June and the 31st of December in each year, every agreement made with the crew for six months previous to those dates, and get a certificate to that effect from him; or the ship will be detained by the customs officer, and the master will be liable to a penalty (s. 119). A copy of the agreement must be put up at the beginning of the voyage in some place on board accessible to the crew (s. 120). It is a misdemeanour to fraudulently alter or make a false entry in or a false copy of the agreement (s. 121), and any alterations made therein without the consent of all the parties thereto (except additions made for substitutes), and the attestation of certain public officials, are wholly inoperative (s. 122). Where seamen are engaged in a colonial or foreign port the foregoing provisions apply, except that the place of the superintendent (where there is none) is taken by a customs or consular officer respectively (s. 124). Special agreements must be made in the case of engaging Lascars or native Indians in India, in special forms approved by the Indian Government; and if a further agreement is entered into with them in the United Kingdom, in addition to the original one, it must be in a form certified by a special officer appointed for that purpose in the United Kingdom by the Indian Government; and any ship having, or having had, Lascars or native Indians on board must, on her arrival in the United Kingdom, give a list and description of all such to a customs or Board of Trade officer, and will not be cleared till she has done so; and her master is liable to a penalty (s. 125). Ships belonging to lighthouse authorities, and pleasure yachts, and fishing boats whether or not exclusively working on the coasts of the United Kingdom, are exempt from these provisions of the Act (ss. 260-263). There is a special form of agreement for use by trawlers of 25 tons and upwards (ss. 399, 400; and see FISHERIES).

A power has been specially reserved to the High Court of rescinding any contract of sea service between the master and crew, if it thinks it just to do so (M. S. A., s. 168). Superintendents are also given power to determine finally questions between a master or owner and his crew, if both parties agree in writing to submit them to him; and also questions as to wages in the case of foreign-going ships, on the application of either party, where the amount does not exceed £5 (s. 137; and see SEAMAN).

The treatment of the crew on board the ship is also prescribed by statute. Complaints may be made by the crew of any British ship with regard to their provisions and water to various public officers, *e.g.* com-



manders of H.M.'s ships, who are to have them inquired into (s. 198). The provisions and water intended for the use of ships going through the Suez Canal, or round the Cape of Good Hope or Cape Horn, are to be inspected by Board of Trade officers (s. 206). The crew are to be given proper medicines, medical stores, and anti-scorbutics (inspected by a medical inspector), and medical attendance at the shipowner's expense, and proper accommodation (ss. 200-210). Entries must be made in the official log-book of all legal convictions and punishments of the crew; the offences they have committed which it is intended to punish; every offence for which punishment is inflicted on board, and the punishment given; the conduct, character, and qualifications of each of the crew; illnesses or accidents happening to them; and the names of those who have ceased to belong to the crew. The log-book is delivered to the superintendent who discharges the crew; and in case of the transfer or loss of the ship it must be sent to the superintendent at the port to which the ship belonged (ss. 240-243). The shipowner also impliedly warrants to his crew that he and his agents will use all reasonable means to ensure the seaworthiness of the ship for the voyage at the time when the voyage begins, and to keep her in a seaworthy condition for the voyage during the voyage (s. 458). The discharge of the crew of a foreign-going British ship, whether registered in the United Kingdom or not, if it takes place in the United Kingdom, must be made before a superintendent, and of a home trade ship, may be so if the master or owner so desires (s. 127). For the rights of the crew in salvage, see SALVAGE.

For the purpose of registering all persons serving in ships subject to the Merchant Shipping Act, the master of a foreign-going ship whose crew is discharged in the United Kingdom wherever she be registered, and the master of a home trade ship, are bound to make out a list (known as the list of the crew) in a form approved by the Board of Trade, containing the following particulars, viz.: the number and date of the ship's register and her registered tonnage; the length and general nature of the voyage or employment; the names, ages, and birthplaces of all the crew, including the master and apprentices, their ratings in their last ship or employment, and the dates and places of their joining the ship; the names of any of the crew who have ceased to belong to the ship, with the times, places, causes, and circumstances thereof; the names of any of the crew maimed or hurt, with the like; the wages due at death to any of the crew who have died; or the property of any such, with a statement of how it has been dealt with, and the proceeds which it fetched (if sold); and any marriage taking place on board, and the names and ages of the parties. In case of a foreign-going ship the list of the crew must be delivered by the master within forty-eight hours of the ship's arrival or the crew's discharge, to the superintendent before whom they are discharged; in case of a home trade ship it must be delivered to some superintendent in the United Kingdom in twenty-one days after the 30th of June and the 31st of December in each year; and without a certificate being produced from the superintendent of such delivery a ship may be detained and refused clearance inwards (s. 253). In case of the transfer or loss of the ship this list of the crew must be sent to the superintendent at the port to which she belonged (s. 255).

On the other hand, the liabilities and duties of the crew are correlative to their privileges, and are expressly and fully stated in the form of agreement sanctioned by the Board of Trade for their engagement (see Maude and Pollock, ii. 395, 397, 403), the chief of these being obedience to the lawful orders of the ship's master and officers.

The power of the master over the crew is thus described by Lord Tenterden: "At common law the master of a ship has authority over all the mariners, and it is their duty to obey his commands in all lawful matters relating to the navigation of the ship or the preservation of good order; and such obedience they expressly promise to yield to him by the agreement usually made for their service. In case of disobedience or disorderly conduct he may lawfully correct them in a reasonable manner, his authority in this respect being analogous to that of a parent over his child or of a master over his apprentice or scholar. . . . The master may be called upon by action at law to answer to a mariner who has been beaten or imprisoned by him or by his order in the course of the voyage; and for the justification of his conduct he should be able to show not only that there was a sufficient cause for chastisement, but also that the chastisement itself was reasonable and moderate. . . . In the case of actual and open mutiny by the crew, or any part of them, the resistance of the master becomes an act of self-defence. But although the master may by force restrain the commission of great crimes, he has no judicial authority to punish the criminal, but ought to secure his person, and cause him to be brought before a proper tribunal of his own country" (Abbott, 182). The Courts have accordingly held masters justified in flogging mutinous or disobedient seamen, whether the ship was at sea or in a foreign port (*The Louther Castle*, 1825, 1 Hag. Adm. 384; *Lamb v. Burnett*, 1831, 1 Crompt. & J. 291), or putting them in irons (*Murray v. Montire*, 1834, 6 Car. & P. 471), or quelling mutiny, or an act approaching to it, by force (*The Lima*, 1837, 3 Hag. Adm. 346, 353); and they have held them liable in damages where they have used force immoderately and unreasonably (*The Centurion*, 1823, 1 Hag. Adm. 161): but at the present day it would be hardly ever possible to justify the use of flogging as a "reasonable and moderate chastisement" (Abbott, 184). The master is liable in damages for undue use of force against any of his crew, either in admiralty (*The Agincourt*, 1824, 1 Hag. Adm. 274; *The Echantress*, 1825, *ibid.* 395) or at common law (*Watson v. Christie*, 1800, 2 Bos. & Pul. 224; *Rhodes v. Leach*, 1819, 2 Stark. 516; *Aitken v. Bedwell*, 1827, Moo. & M. 68). On the other hand, obedience by the crew to the lawful orders of the master, even though he use his authority intemperately or discourteously, is still as necessary as it was under the old decisions (*The Exeter*, 1799, 2 Rob. C. 261, Lord Stowell). The modern law on the subject of the discipline of the crew is contained in the Merchant Shipping Act, which prescribes penalties (as well as forfeitures of wages or similar punishments agreed to by the contract of service) for misconduct endangering life or the safety of the ship, desertion, absence without leave, disobedience to orders, and general offences against discipline (ss. 220-238). See SEAMAN.

The duty of the crew to the ship begins from the date of their engagement, and continues till it is dissolved, *e.g.* by the ship reaching her destination; but the mere arrival of the ship there does not in all cases put an end to their service; their duty may extend to the time of unlivery of the cargo (Lord Stowell, *The Baltic Merchant*, 1809, Edw. A. R. 86; Sir C. Robinson, *The Cambridge*, 1829, 2 Hag. Adm. 243); and leaving the ship before that takes place is a desertion at common law (*The Baltic Merchant*, above), unless justified by a good reason, *e.g.* illness (*The Test*, 1836, 3 Hag. Adm. 307); but now quitting the ship without leave after her arrival at her port of delivery and before she is placed in security is punishable by forfeiture of a month's wages (M. S. A., s. 225 (1) (a)). The contract of sea service may also be terminated by "final abandonment of the ship or the act of the master" in

giving the crew their discharge" (Dr. Lushington, *The Warrior*, 1862, Lush. 476 and 482); but till one of those events takes place their service is wholly due to the ship. "The stipulated duty of the crew to be compensated by payment of wages is to protect the ship through all perils, and their entire possible service for this purpose is pledged to that extent" (Lord Stowell, *The Neptune*, 1824, 1 Hag. Adm. 236; see also Maude and Pollock, i. 177, 178). The crew cannot accordingly claim salvage against their own ship, unless their service has been determined in one of the above ways (*The Le Jonet*, 1872, L. R. 3 Ad. & Ec. 551, Sir R. Phillimore; *The Florence*, 1852, 16 Jur. 573).

But if one ship renders salvage service to another ship belonging to the same owners, that fact does not preclude the master and crew of the former from being rewarded if their services are not within the contract which they originally entered into with their owners (*The Sappho*, 1871, L. R. 3 P. C. 690). See SALVAGE. The crew are not exonerated from the performance of their duty by the presence of a pilot on board the ship; for "although the pilot has charge of the ship, the owners are responsible to third persons for the competency of the master and crew, and their obedience to the orders of the pilot" (Parke, B., *The Christiana*, 1850, 7 Moo. P. C. 165). See COLLISION; PILOT.

For the law relating to wages, discipline, protection, and liability of seamen, see SEAMAN.

[*Authorities*.—Abbott, *Shipping*, 13th ed.; Maude and Pollock, *Shipping*, 4th ed.; Kay, *Shipping*, 3rd ed.; Maclachlan, *Shipping*.]

**Crime.**—It is somewhat difficult to define what amounts to a crime in English law. Historically it is an act or omission which gives rise to an accusation (*crimen*) as distinct from an action (*actio*). But it is well known that in English law many acts now prosecuted on indictment were dealt with at the suit of a private person by appeal, or, as in the case of infanthief, by lynch law. In other words, certain acts now regarded as crimes were treated at first as acts of, or excuses for, private war, in the absence of any conception of public justice or the supreme authority of king or commonwealth.

The present definition of crime in English law is—"Disobedience to a command or prohibition made with reference to a matter affecting public peace, order, or good government to which a sanction is attached, by way of punishment or pecuniary penalty, in the interest of the State as a whole, and not by way of compensation for the injury which the act or omission may have caused to an individual." Where the command or prohibition is statutory, disobedience is none the less a crime that no specific punishment is annexed by the statute, and in such cases constitutes a misdemeanour indictable at common law. Mere disobedience, without more, in some cases constitutes the crime; but, as a general rule, it must be disobedience *sub modo et forma*, i.e. by a person of sufficient age and mental capacity and freedom of action, and accompanied by that condition of will or intellect which is described as *mens rea*, or a guilty mind (see *Bank of N. S. W. v. Piper*, 1897, 13 T. L. R. 413; *Sherras v. de Rutzen*, [1895] 1 Q. B. 918; *Derbyshire v. Houlister*, [1897] 1 Q. B. 772; *Hardcastle on Statutes*, 2nd ed., 472-488).

There is an intermediate class between civil remedies and the remedy by indictment *pro rege*, namely, the proceeding by information. Criminal informations *ex officio* are a royal remedy. Informations issued by leave

of the High Court are quasi-royal. But many penal statutes gave the penalties to informers suing either for themselves, as directly aggrieved, or as common informers who sued both for themselves and the Crown (*qui tam pro rege quam pro se ipso*). It was established in *Clark v. Bradlaugh* (1883, 8 App. Cas. 394) that, as a general rule, even where the procedure is by action and not by information, the penalties under penal statutes accrue to the Crown, and suit for them is by the Crown only, unless an alternative procedure is allowed. And in proceedings on penal statutes other than before justices, the act or default is so far regarded as of a criminal nature that the defendant is not required to answer any interrogatories or criminating questions (*Lord Merborough v. Westwood Urban District Council*, 1897, 13 T. L. R. 443). Again, in the case of proceedings before justices, a distinction is drawn between proceedings on information culminating in conviction and proceedings on complaint culminating in an order or an adjudication of the existence of a civil debt or liability.

Proceedings to enforce the civil rights of the Crown, or to protect its revenue, though in form quasi-criminal, are not regarded as of a criminal nature in these cases in which they can eventuate only in a debt to the Crown, and not in a judgment or order of a punitive character. These proceedings are so far public or penal that a foreign State would not give any assistance from its Courts apart from extradition treaties to enforce the rights of the British Crown (*Huntington v. Attrill*, [1893] App. Cas. 150). It is only where the peace, crown, and dignity of the sovereign is affected, as distinct from his pocket, that an act can in English law be described as criminal, and the procedure in such a case is to vindicate and punish by retributive justice, and not to compensate, although in certain forms of civil proceedings exemplary or vindictive damages are permitted, as distinct from mere compensation. See DAMAGES.

**Criminal.**—The term criminal is generally employed as a correlative to crime (see CRIMINAL LAW). It is also used in particular statutes, with a special connotation, e.g. "criminal lunatics" (see ASYLUMS, *ante*, vol. i. p. 395) and "criminal prisoners" (see PRISON), and in the Extradition Acts of "fugitive criminals" (see EXTRADITION).

**Criminal Cause or Matter.**—Under sec. 24 of the Judicature Act, 1873, 36 & 37 Vict. c. 66, there were assigned to the Queen's Bench Division of the High Court of Justice all causes and matters, criminal and civil, which, prior to the Act, would have been within the exclusive cognisance of the Court of Queen's Bench in the exercise of its original jurisdiction, owing to the merger of the Superior Courts of common law in the Queen's Bench Division. The appellate or supervisory power of those Courts in criminal cases is now exclusively exercised by the Queen's Bench Division, except with respect of CROWN CASES RESERVED (*q.v.*), under sec. 47 of the Judicature Act, 1873.

The Court of Appeal was denied all jurisdiction to hear an appeal from a judgment of the High Court on any criminal cause or matter, save for some error of law apparent on the record of proceedings on an indictment, as to which no case has been reserved under the Crown Cases Reserved Act, 1848, 11 & 12 Vict. c. 78. A large number of cases have been decided as to the meaning and extent of the words "criminal cause or matter." The

expression, it is to be observed, is much wider than "crime" (*R. v. Barnardo*, 1889, 23 Q. B. D. 305). In substance, the result of the cases is that every cause or matter is criminal which is a proceeding for penalty by way of punishment and not by way of compensation (*R. v. Kerswill* [1895], 1 Q. B. 1). This includes all proceedings before a Court of summary jurisdiction for conviction and penalties for breaches of statutes or by-laws (*Mellor v. Denham*, 5 Q. B. D. 467; *R. v. Whitchurch*, 1881, 7 Q. B. D. 534; *R. v. Tyler*, [1891] 2 Q. B. 588), but not proceedings on complaint to obtain a summary order. It is immaterial whether these proceedings come for review in the High Court by *habeas corpus* (*R. v. Rudge*, 1885, 16 Q. B. D. 459; *R. v. Fletcher*, 1877, 2 Q. B. D. 43), *certiorari* (*R. v. Central Criminal Court*, 1888, 18 Q. B. D. 314), *mandamus* to hear (*R. v. Young*, 1891, 66 L. T. 16) or to state a case; prohibition, or special case (*Blake v. Bech*, 1877, 2 Ex. D. 335; *Ex parte Schofield*, [1891] 2 Q. B. 428; *Payne v. Wright*, 1892, 61 L. J. M. C. 114). "Criminal cause or matter" also includes every kind of proceeding in the High Court for an indictable offence, except a writ of error (*Brailaugh v. R.* 1878, 3 Q. B. D. 607); and applications by fugitive criminals from foreign States, or fugitive offenders from British colonies or places to which the Foreign Jurisdiction Acts apply (*Ex parte Woodhall*, 1888, 20 Q. B. D. 832).

Contempt of Court is also a criminal cause or matter (whether the punitive method adopted is by attachment or committal order) when the contempt for which punishment is sought is a substantive offence by a person not a party to civil proceedings (*O'Shea v. O'Shea*, 1890, 15 P. D. 59), and is not a subsidiary means of compliance with the orders of the Court in the civil proceeding (*Godfrey v. George*, [1896] 1 Q. B. 48). See CONTEMPT OF COURT.

For determining the limits of the jurisdiction of the Court of Appeal it is immaterial at what stage of the proceedings the judgment or order on which appeal is brought arises, if the cause or matter on which it arises is in substance criminal, or the procedure, even if for enforcing a civil right, is criminal and may end in imprisonment. Thus appeals as to taxation of costs (*R. v. Steele*, 1877, 2 Q. B. D. 37), special cases to determine the validity of issue of a distress warrant by justices for poor rates (*Seaman v. Burley*, [1896] 2 Q. B. 344), and applications for bail (*R. v. Foote*, 1883, 10 Q. B. D. 378), have been held not to be cognisable by the Court of Appeal.

**Criminal Conversation.**—An action lay at common law for criminal conversation (*crim. con.*) at the suit of a husband, to recover damages against an adulterer. It was abolished in 1857, and a remedy by claim of damages against a co-respondent substituted. See DIVORCE.

**Criminal Law** is that part of the laws of England which deals with the definition and punishment of crime, including the procedure for the trial of persons suspected or accused. It is divided into substantive law, i.e. the provisions which define the elements of offences, and the penalty to be imposed on conviction; and adjective law, i.e. the provisions regulating arrest, charge, and trial. In the absence of a criminal code, or a code of criminal procedure, the criminal law is a combination of common law and fragments of innumerable statutes welded, so far as it is welded, into a whole, only by the industry of text-writers, who have assimilated and

collected the immense materials afforded by ancient treatises, case law, and the statute-book.

The nomenclature and classification adopted by publicists for the different branches of law do not closely, if at all, correspond to the traditional divisions of the English common law (*coutumier*), or even to those suggested or sanctioned by the multifarious ineptitude of successive Parliaments; nor is it easy to select any scientific definition of criminal law which will include all the acts and omissions which amount to crimes in our law. In the older law books, crime and sin were not very clearly distinguished (see *Mirror of Justices, passim*); and all offences against the law which were regarded as *mala in se*, or what the French call *crimes de droit commun*, offences common to all systems of jurisprudence as distinguished from *mala prohibita*, or infractions of particular and local enactments, were treated as involving so much moral iniquity as to earn the name "crime." But that word rarely, if ever, appears in an English statute as a term of art, except in the Prevention of Crime Acts, in which it has a limited statutory connotation (34 & 35 Vict. c. 112).

English criminal law was gradually developed from the four remedies for wrong known to Saxon and Anglo-Norman law—(1) Outlawry, which still survives theoretically as a process, but not as a punishment, was the joint action of the community against a wrong-doer, hunting him down like a wolf, or executing what is now known as lynch law. (2) Blood-feuds were a kind of private war where the wrongs affected families rather than the community, appeased only by payment of war gild. (3) The next stage was where the Crown and the injured party received compensation for the wrong (*bot*) to the injured person, and *wite* to the king. (4) The final stage was where punishment in the proper sense superseded the more primitive remedies; and death or mutilation, coupled with fines and forfeitures, became the recognised penalty for certain wrongs. The final aspect of this view of crime led to a greatly increased activity on the part of officers of justice, whether of Crown or franchise, in the interest of the revenue; and gradually to the absorption by the Crown of the jurisdiction in what were then called pleas of Crown.

When this stage was reached, crimes were divided into emendable and unemendable, or bootless, crimes, *i.e.* those which could or could not be atoned for by civil damages. The history of the process is perhaps best to be traced in Pollock and Maitland (*Hist. Eng. Law*, ii. 455), and the authorities by them cited. The result was the gradual disappearance of the franchise jurisdictions and local laws as to crime, and the creation of the classification, now familiar, of treason, felony, and misdemeanour, all of which fall under the common name of pleas of the Crown; and have this further in common, that all are regarded as offences against the peace of the king, and that the remedy for this breach of the peace can be pursued only by indictment, *i.e.* the accusation of at least twelve inhabitants of the county, borough, or franchise in which the act or default took place, summoned to attend the king's Court and inform the judges *pro rege* of breaches of the king's peace in their district. There is an apparent exception to this in the right of the Crown to proceed by information for misdemeanours, which is probably a usurpation, and is now rarely exercised.

Historically, the idea of the king's peace, which grew in strength with the centralisation of English government, and superseded the minor notions of the peace of God, or the Church, and of the sheriff, or of a particular lord of franchise who had criminal jurisdiction, was set up in opposition to the practice of private war or revenge, and in assertion of

the general feudal superiority and protection of the king; and the procedure for its enforcement, when it did not savour of ecclesiastical methods, such as compurgation or ordeal (*judicium dei*), followed the analogies of private war by its resort to wager of battle, until the method of trial *in pais* was made open for the selection of the accused.

Apart from legislation, "crime" and indictable offence are in England synonymous. But treason and felony have always stood apart (like "high crimes and offences" in Scots law) from misdemeanour or (as it was also styled) trespass against the peace, because of the difference in the consequences of conviction and in the procedure before and during trial. And when legislation began to add to the common law category of offences, every new offence, unless otherwise qualified by statute, was held to be a misdemeanour (*transgressio*), which has been happily described by Dr. Johnson to Boswell as "a kind of indefinite crime, not capital, but punishable at the discretion of the Court" (*Boswell's Life*, edition Hill, vol. iii. p. 214). The public remedy for breach of a statute, in the absence of other provision, is by indictment for misdemeanour (*R. v. Hall*, [1891] 1 Q. B. 713), and all breaches of statute or by-law for which a remedy by information before justices is given, are still technically regarded as petty misdemeanours, though they in no sense fall within the popular notion of crime or even *delict*, and correspond rather to what in France are styled *contraventions* (see CONTRAVENTION).

The history of the criminal law of England has been most effectually dealt with up to the seventeenth century by Sir Matthew Hale in his *Plens of the Crown*, and in this century by Sir James Stephen in his *History of Criminal Law* and his *Digests of Criminal Law and Procedure*. The basis for these latter works is to be sought in the elaborate reports of the Criminal Law Commissioners in the forties, which in England have borne little fruit except the Criminal Law Consolidation Acts of 1861 and a series of abortive draft criminal codes, but have in India, under Macaulay and his successors, led to the framing of the Indian Penal Code. As the law of England still stands, it is more usual and more profitable for practical purposes to consider each offence separately than to attempt to treat all the criminal law under a single head.

**Criminal Lunatics.**—See ASYLUMS, vol. i. p. 393.

**Criminal Proceeding.**—This term, for the purpose of the competence of witnesses or admissibility of evidence, means a proceeding for an indictable offence, or a proceeding by information for a conviction under the procedure of the summary jurisdiction, whatever the Act be constituting the penalty (see *Cattell v. Ireson*, 1858, 27 L. J. M. C. 167). It does not apply to Crown suits, nor to proceedings under the Clergy Discipline Acts. See CROWN OFFICE.

**Crimp.**—A person who makes it his business to procure sailors or soldiers, by decoying, entrapping, or impressing them. During the Napoleonic war crimps drove a thriving trade in obtaining by force or fraud seamen for the Royal Navy. The practice extended to merchant seamen; and provisions for its prevention are made by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), see secs. 110, 111, 112, 213–219

of that statute. These provisions apply to British seagoing ships, but can be extended to foreign ships in certain cases by Order in Council (s. 219).

**Criticism.**—"A man who publishes a book challenges criticism" (per Cockburn, C.J., in *Strauss v. Francis*, 1866, 4 F. & F. 1114; 15 L. T. 675). Such a book becomes at once public property; its style and contents are matters of public interest, and therefore legitimate criticism on it is not libellous. So, too, it is not libellous fairly and honestly to criticise a painting or statue publicly exhibited (*Whistler v. Ruskin*; *Times* for November 26 and 27, 1878), or the architecture of any public building (*Thompson v. Shackell*, 1828, Moo. & M. 187), however strong the terms of censure used may be. So, too, all public entertainments, theatrical and musical performances, flower-shows, concerts, public balls, etc., may be freely criticised, provided that the comments be not malevolent, and no misstatement of fact be made (*Dibdin v. Swan & Bostock*, 1793, 1 Esp. 28; 5 R. R. 717; *Green v. Chapman*, 1837, 4 Bing. N. C. 92; 5 Scott, 340). And this right of criticism is in no way the special privilege of the press. Every citizen has full liberty to speak and to write on such matters.

Legitimate criticism is no tort: should loss result from it to the plaintiff, it is *damnum absque injuria*. True criticism differs from defamation thus:—(1) Criticism deals only with such things as invite public attention, or call for public comment. It does not follow a public man into his private life, or pry into his domestic concerns.

(2) Criticism never attacks the individual, but only his work. A true critic never indulges in personalities, or recklessly imputes dishonourable motives, but confines himself to the merits of the subject-matter before him.

(3) The critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste. He will carefully examine the production before him, and then honestly and fearlessly state his true opinion of it (see the judgment of Lord Ellenborough, C.J., in *Carr v. Hood*, 1808, 1 Camp. 355 n.; 10 R. R. 701 n.).

(4) The critic must avoid all misstatement of fact about the work before him or the author. To assert as a fact what is untrue is a very different thing from expressing an opinion. This distinction is emphasised in the valuable judgments delivered in *Mericale v. Carson*, 1887, 20 Q. B. D. 275, which is the leading case on the subject. The points there decided may be thus summarised:—

(a) The fact that the words are a fair comment on a matter of public interest does not create what is technically known as "a privileged occasion." If the jury hold the comments unfair, it is immaterial that the writer honestly believed them to be true (see *Campbell v. Spottiswoode*, 1863, 3 B. & S. 769; 32 L. J. Q. B. 185). A right which every citizen possesses merely because he is a citizen of the State, is not a privilege. And the proper exercise of such a right is not actionable. A fair comment on a matter of public interest is therefore no libel. "It is only when the writer goes beyond the limits of fair comment that his criticism passes into the region of libel at all" (per Bowen, L.J., 20 Q. B. D. at p. 283).

(b) In deciding on the meaning of a criticism on a book or a play, the jury must ask themselves, "How would persons who have never read the book or seen the play understand the criticism?" The book or play cannot be imported to aid in construing the critique; though it may be



looked at afterwards, when the meaning of the words is determined, to see whether the criticism is fair.

(c) If a critic, instead of stating what he honestly thought of a book or a play, denounced it in stronger terms than he himself believed it to deserve, then all immunity is lost; and that whether he did so from personal ill-will against the author, or from a love of smart writing and of saying sharp things.

(d) But so long as a critic makes no attack on the author apart from his work, and makes no false assertion of fact about either, but honestly states his genuine opinion of the book or play on which his criticism is invited, then it is very difficult to say when the bounds of fair criticism are exceeded. It is clearly not necessary that the jury should agree with the critic; he is entitled to publish his own opinion, however mistaken or unsound others may think it. The jury should not be asked whether he formed his opinion with sufficient care or on reasonable grounds. So, too, the fact that his words are strong, or even intemperate, is not enough to make his criticism unfair. The judge should ask the jury, "Is this criticism in your opinion beyond what any reasonable man, however prejudiced or however wrong his opinion might be, could fairly say of the work in question?" If the jury, after looking at the book or the play, think the criticism published by the defendant was such as no fair man could honestly have written about that book or play, then and then only are they to find for the plaintiff.

By this decision, authors are adequately protected from misrepresentation, while at the same time the liberty of the press is preserved.

[*Authorities.*—See the ordinary text-books on libel enumerated at end of article DEFAMATION.]

**Croft** is defined in Shepherd's *Touchstone* (7th ed., p. 95) as "a little close, or pightle, adjoining to a house, used either for pasture or arable, as the owner pleases. In many places such close is called a ham."

**Crops.**—*Fructus industriales*, as distinguished from *fructus naturales*, are "goods" within the Sale of Goods Act, 1893, and may be taken under a *fi. fa.*, except in those cases falling within 56 Geo. III. c. 50, where the tenant is bound by covenant or agreement with his landlord not to take the crops off the farm. Crops are also "personal chattels" within the Bills of Sale Act, 1878, when assigned separately from the land. They may be distrained for rent, and sold when ripe.

By the Malicious Damage Act, 1861, s. 16, it is made felony to set fire unlawfully and maliciously to any crop of hay, grass, corn, etc., whether standing or cut down.

**Cross; Crucifix.**—See ORNAMENTS RUBRIC.

**Cross-Action.**—Prior to the Judicature Acts the defendant in an action who had a cross-claim against the plaintiff could only avail himself of the same by instituting a cross-action. This may still be done, but as the policy of these statutes is to have all matters in dispute between litigants disposed of if possible in one action, one of two cross-actions may

be ordered to be stayed and set up as a counter-claim to the other. When cross-actions arise out of the same subject-matter, and such an order is made, the action brought against the party on whom the burden of proof lies will be stayed, and the action brought by him allowed to proceed, all questions raised by the party in the action that is stayed being allowed to be set up by way of counter-claim, etc., to the other action (*Thomson v. South-Eastern Ry. Co.*, 1882, 9 Q. B. D. 320). It is, however, usual, instead of bringing a cross-action, to set up at once a counter-claim in the original action—the counter-claim being in the nature of a cross-action, and it and the original action being considered for all purposes except execution two independent actions (per Lord Esher, M. R., in *Stumore v. Campbell*, [1892] 1 Q. B. 317). See DEFENCE AND COUNTER-CLAIM.

**Cross Appeals.**—A. *To the Court of Appeal.*—Cross appeals to the Court of Appeal are regulated by the provisions of R. S. C., 1883, Order 58, rr. 6, 7.

It is not necessary for a respondent to give notice of motion by way of cross appeal; but if he intends upon the hearing of the appeal to contend that the decision of the Court below should be varied, he must within the prescribed time give notice of such intention to any party who may be affected by such intention (r. 6).

The notice prescribed by the above rule cannot be given by a respondent who desires to have an order varied on a point in which the appellant has no interest. In such case a formal notice of appeal must be given (*In re Cavander's Trusts*, 1881, 16 Ch. D. 270). In an earlier case, a notice given by a respondent was proceeded upon, though the point was one in which the original appellant had no interest (*Ralph v. Carrick*, 1879, 11 Ch. D. 873).

A respondent may give notice to a co-respondent that, on the hearing of the appeal, he will ask for a variation of a part of the judgment or order appealed from, which has been made in favour of the co-respondent (*Ex parte Payne*, *In re Cross*, 1879, 11 Ch. D. 539; and see *Harrison v. Cornwall Mineral Ryys. Co.*, 1881, 18 Ch. D. 334; *Johnstone v. Cox*, 1881, 19 Ch. D. 17).

The notice given by a respondent under the rule need not be given within the time prescribed for appealing by r. 15 (*Ex parte Bishop*, *In re Fox & Co.*, 1880, 15 Ch. D. 400). The notice must, in the case of any appeal from a final judgment, be an eight days' notice, and in the case of an appeal from an interlocutory order, a two days' notice (r. 7).

Even though the appeal be withdrawn, the respondent may proceed upon his cross notice (*In re Cavander's Trusts*, 1881, 16 Ch. D. 270). If he elect to so proceed, the appellant may give notice that, on the hearing of the respondent's appeal, he will bring forward his original contention (*The Beeswing*, 1884, 10 P. D. 18).

The costs of a respondent who has given notice under the rule are dealt with in the same manner as if he had presented a cross appeal (*Harrison v. Cornwall Mineral Ryys. Co.*, 1881, 18 Ch. D. 334). Where both appeal and cross appeal were dismissed, the appellant was ordered to pay the costs, less the amount of costs occasioned by the cross notice (*The Lauretta*, 1879, 4 P. D. 25). The costs will in a proper case be apportioned (*Harrison v. Cornwall Mineral Ryys. Co.* (*ubi supra*)); but not where the costs have not been materially increased by the cross notice (*Robinson v. Drakes*, 1883, 23 Ch. D. 98). See further as to costs, *Harris v. Aaron*, 1877, 4 Ch. D. 749; *Cracknall v. Janson*, 1879, 11 Ch. D. 1; *Johnstone v. Cox*, 1881, 19 Ch. D. 17.

[*Authorities.*—Dan., *Ch. Pr.*, 6th ed., pp. 1290, 1291; Dan., *Forms*, 5th ed.,

pp. 626, 627; Seton, 5th ed., pp. 737, 738; Chitty, *Archbold*, 14th ed., pp. 980, 981; Morgan, *Acts and Orders*, 6th ed., pp. 512, 513; *The Annual Practice*, 1897, pp. 1064, 1065.]

**B. To the House of Lords.**—All cross appeals must be presented to the House within the period allowed for lodging cases on the original appeal (Standing Orders H. L., No. VI.). The time therefore within which a cross appeal must be lodged is, in English cases, six weeks from the date of the presentation of the original appeal, and in Scotch and Irish cases within eight weeks (Standing Orders H. L., No. V.). Where the six weeks expire during the recess of the House, the period is extended to the third sitting day of the next ensuing meeting of the House (Standing Orders H. L., No. VII.).

Separate printed cases have to be presented to the House. As a rule, no security for costs is required. Otherwise cross appeals are subject to the Standing Orders applicable to appeals generally.

[*Authorities.*—Dennison and Scott, *Practice*, p. 91; Dan., *Ch. Pr.*, 6th ed., p. 1317. As to cross appeals to the Privy Council, see Macpherson, *Practice*, p. 91.]

See APPEALS.

**Cross Remainders.**—"When lands are given, in undivided shares, to two or more, for particular estates, so as that, upon the determination of the particular estates in any of those shares, they remain over to the other grantees, and the reversioner or remainderman is not let in till the determination of all the particular estates, the grantees take their original shares as tenants in common, and the remainders limited among them on the failure of the particular estates are known by the appellation of cross remainders" (Butler's note (1) to Co. Lit. 195 b). Cross remainders are invariably inserted in settlements, where lands are limited to the daughters or to all the children of a marriage as tenants in common in tail in equal shares (see Davidson, *Proc. Contr.* vol. iii. pp. 330, 1196, 1237, 3rd ed.; Williams on *Settlements*, 202–205, 288). The following is an example of the limitation of cross remainders in tail male: "To the use of all the daughters of the said C. D. by the said A. B. and the heirs male of their respective bodies in equal shares as tenants in common And if and so often as any such daughter shall die without issue male then as well as to her original share as also as to the share or shares that shall have survived or accrued to her or to the heirs male of her body to the use of the others of such daughters and the heirs male of their respective bodies in equal shares as tenants in common And if all such daughters but one shall die without issue male or there shall be but one such daughter to the use of such one or only daughter and the heirs male of her body" (Davidson, *Proc. Contr.* vol. iii. p. 1196, 3rd ed.). Since the Conveyancing Act of 1881 took effect it has been common to create such remainders in shorter form, relying on the Act, as thus: "To the use of all the daughters of the said C. D. by the said A. B. in equal shares as tenants in common in tail male with cross remainders between them as to their original and accruing shares as tenants in common in tail male and if there shall be but one such daughter or there shall be a failure of male issue of all such daughters but one then to the use of such one daughter in tail male."

Cross remainders have mainly engaged the attention of the Courts in connection with the question in what cases they can be implied. The rule

is well settled that cross remainders will not be implied in a deed (*Cole v. Livingston*, 1 Vent. 224, 3 Keb. 2; *Doe d. Tanner v. Dorrell*, 5 T. R. 518; *Doe d. Poquett v. Worsley*, 1 East, 416; *Doe d. Clift v. Birkhead*, 4 Ex. Rep. 110, 124). This rule would appear to hold good whether the limitations in the deed were of legal estates or of equitable estates created by way of executed trust (see *In re Whiston's Settlement*, [1894] 1 Ch. 661, and cases there cited). But where a settlement is made by agreement taking effect by way of executory trust, as in the case of marriage articles, cross remainders may be implied; and so long as the trusts are executory, it matters not that the agreement be under seal (*West v. Errissey*, 2 P. Wms. 349, 356; *Twisden v. Lock*, Amb. 663; *Duke of Richmond v. Lord Cadogan*, cited 17 Ves. 67; *Phillips v. James*, 3 De G., J. & S. 72). In the case of a gift by will, "the principle has long been admitted that wherever real estate is devised to several persons in tail as tenants in common, and it appears to be the testator's intention that not any part is to go over until the failure of the issue of all the tenants in common, they take cross remainders in tail among themselves" (2 Jarm. *Wills*, 536, 4th ed., 1339, 5th ed.). And this principle has been extended to admit of the implication of cross remainders for life where lands have been devised to a class of children as tenants in common for life, with a gift over on the death of all (*Ashley v. Ashley*, 6 Sim. 358). Cross remainders may also be implied between a class of children holding in common, of whom some are tenants in tail and others tenants for life with remainder to their children in tail (*Vanderplank v. King*, 3 Hare, 1). And the doctrine is not confined to real estate, as cross executory limitations may be implied in gifts by will of personal estate to tenants in common, where an intention to this effect can be gathered from the words of the will (*In re Ridge's Trusts*, L. R. 7 Ch. 665; *In re Hudson*, 20 Ch. D. 406).

[*Authorities*.—See further 1 Wms. Saund. 185 *a*, *n*. (6); 1 Jarm. *Wills*, ch. 42, pp. 536 *sq.*, 4th ed., 1339 *sq.*, 5th ed.; Theobald on *Wills*, 610–613, 4th ed.; Elphinstone, Norton, and Clark, *Interpretation of Deeds*, 289 *sq.*]

**Crown.**—The term "crown" is used in English law for an impersonal description of the Sovereign, applicable alike to either sex. In the present work the subject of Crown law is dealt with under several heads: the Crown as a constituent part of Parliament, under PARLIAMENT (see also ASSENT (ROYAL)); the Crown in Council, under PRIVY COUNCIL; the executive powers of the Crown, under PREROGATIVE; the agents through whom such powers are exercised, under CABINET, MINISTERS, SECRETARY OF STATE, etc.; the judicial powers of the Crown, under SUPREME COURT, etc.; the remedies available against the Crown, under PETITION OF RIGHT; the revenues of the Crown, under LIST (CIVIL), CROWN, LAND, etc., HEREDITARY REVENUES. The title to the Crown is dealt with under ACT OF SETTLEMENT and BILL OF RIGHTS; see also ACCESSION, ABDICATION, CORONATION, DEMISE OF THE CROWN, REGENCY, ROYAL MARRIAGE ACT, ROYAL WILLS.

**Crown Cases Reserved.**—Prior to 1848, in the case of Courts of oyer and terminer and gaol delivery a practice was in vogue for the judge or commissioner of assize to reserve any difficult question of law in order to consult thereon with the other judges of the superior Courts of common law. The consultation usually took place at Serjeants'

Inn Hall, or in the chambers of some judge of that Inn, and counsel were heard if desired; but the proceedings were not strictly judicial, although many of the conclusions reached at such consideration are reported and treated as authoritative. By the Crown Cases Reserved Act, 1848, 11 & 12 Vict. c. 78, this practice was recognised, regularised, and extended. Under that Act any Court of oyer and terminer or gaol delivery (*i.e.* Circuit Courts and the Central Criminal Court), and any county or borough Court of Quarter Sessions, can reserve any question of law which arises at a trial before it, in which a conviction has taken place, for the consideration of what is termed the Court for Crown Cases Reserved. The reservation is effected by stating in a special case, signed by the judge, or chairman, or recorder (*R. v. Masters*, 1848, 18 L. J. M. C. 2), the questions of law reserved, and the special circumstances upon which they arose. The case is transmitted to the Court for Crown Cases Reserved, which now consists of the judges of the High Court of Justice (36 & 37 Vict. c. 66, s. 47), or any five of them, of whom the Lord Chief Justice of England is to be one, if he is able to attend (44 & 45 Vict. c. 68, s. 15). Usually the cases are heard only by five judges of the Queen's Bench Division; but where a difficult question arises all the judges of that Division, and even judges of the other Divisions, and even of the Court of Appeal, can be called in (*R. v. Keyn*, 1876, 2 Ex. D. 63). The transmission of the case is not effected through the Crown Office, but through the clerk of the Court for Crown Cases Reserved, and is still, except, perhaps, as to fees, subject to orders of Court made in 1850 (printed in Archbold, *Cr. Pl.*, 21st ed., 215).

On reserving a case, the Court of trial can either give judgment and respite execution, or postpone judgment till the point reserved has been decided, and in either case may commit the defendant to prison, or admit him to bail on recognisances to appear and receive judgment, or render himself in execution. The Court for Crown Cases Reserved hears counsel for the prosecution or defence, if any is retained, the defendant's counsel first, and then the prosecutor's. The Court of trial can provide for the inclusion in the costs of the prosecution of the costs of an argument of a case reserved (*R. v. Cluderay*, 1850, 3 Car. & Kir. 205; *R. v. Lewis*, 1858, Dears. & B. C. C. 326). But apparently the Appellate Court has neither jurisdiction nor machinery for awarding or taxing costs (*R. v. Hornsea*, 1854, 23 L. J. M. C. 59, 62 *n.*; *R. v. Dolan*, 1855, 24 L. J. M. C. 61 *n.*). The Appellate Court has full authority to hear and finally determine the questions reserved, and thereon to reverse, affirm, or amend the judgment below, or to avoid it and order entry on the record that the defendant ought not to have been convicted, or to arrest judgment, or, if no judgment has been given, to direct that it shall be given at a future sitting of the reserving Court, or to make such other order as justice may require. These last words seem to authorise awarding a *venire de novo* where there has been a mistrial (*R. v. Yeadon*, 1861, 31 L. J. M. C. 70). But the Appellate Court cannot amend the indictment (*R. v. Garland*, 1869, 11 Cox C. C. 284) nor decide any point not reserved (*R. v. Tyree*, 1868, L. R. 1 C. C. R. 177). If the case is not sufficiently stated it can be returned for amendment, if the Court think it necessary (11 & 12 Vict. c. 78, s. 4; *R. v. Hey*, 1849, 1 Den. Cr. C. 602; *R. v. Perkins*, 1852, 2 Den. Cr. C. 459; *R. v. Hilton*, 1858, 28 L. J. M. C. 28). The judgment or order, which must be pronounced in open Court, is certified under the hand of the presiding judge to the clerk of the reserving Court; and a certificate of the consequent entry on the record is transmitted by him to the sheriff or governor of the prison in which the accused is in custody, to either of whom it operates as a warrant

for execution of sentence, or discharge from custody, according to its tenor. Where the certificate directs judgment to be given, it must be done at the next session of the reserving Court (11 & 12 Vict. c. 78, s. 2). Forgery, or fraudulent uttering of any certificate mentioned in the Act, with a view to obtain discharge of any person from justice, or to prevent the due course of justice, is a felony punishable by penal servitude from three to ten years, or imprisonment with or without hard labour for not over two years (11 & 12 Vict. c. 78, s. 6; S. L. Rev. Act, 1894; 54 & 55 Vict. c. 69, s. 1).

So much for the procedure under the Act, which is wholly unaffected by the Judicature Act, since it falls neither within the R. S. C. nor the Crown Office Rules (38 & 39 Vict. c. 77, s. 19). The changes in the status of a Court of assize effected by the Judicature Acts, while they have led to the pronouncement that a Court of assize is part of the High Court (*R. v. Dudley*, 1886, 14 Q. B. D. 273, 560), have not in any way altered the practice of stating cases under 11 & 12 Vict. c. 78, nor assimilated it to that which applies to an indictment tried in the Queen's Bench Division, where the judge who tries the case can, if difficulties of law arise, adjourn it for consideration by a fuller Court, or leave the Crown or defendant to move for judgment.

The points of law arising on the trial which can be reserved do not include decisions on demurrers (*R. v. Faldernann*, 1850, 19 L. J. M. C. 147), which are reviewable by writ of error only, nor questions as to the right of a particular person to serve on a jury (*R. v. Mellor*, 1858, 27 L. J. M. C. 121), but do include points arising on a motion to quash an indictment, or a motion in arrest of judgment, or as to admissibility or misreception of evidence, or absence of legal evidence, or the propriety or legality of an amendment made at the time (*R. v. Larkin*, 1854, 23 L. J. M. C. 125), but not mere points of practice (*R. v. Stubbs*, 1855, 25 L. J. M. C. 16). And even where the accused pleads guilty, the plea applies only to the facts, and does not preclude reservation of a case as to the legal effect of the facts admitted (*R. v. Brown*, 1889, 24 Q. B. D. 357). It is uncertain whether the Court for Crown Cases Reserved can consider questions whether evidence is irregularly given, or whether the remedy is by writ of error in such a case (*R. v. Martin*, 1872, 1 L. R. 1 C. C. R. 378).

There is no appeal from the decision of the Court for Crown Cases Reserved, appeal by writ of error being excluded by the form in which the points of law are reserved, and the Court of Appeal having direct jurisdiction in criminal causes or matters only upon writ of error (36 & 37 Vict. c. 66, s. 47). On this statement of the nature and limits of the jurisdiction of this Court certain defects of the present provisions of English law as to review or appeal in criminal causes are patent: (1) That the Act of 1848 omitted to deal with the now almost obsolete procedure by writ of error; (2) that the right of the accused to have a case reserved is precarious, depending on the goodwill of the primary Court, instead of the opinion of the Court of review; (3) that the Court of Appeal, while it cannot directly intervene in certain criminal causes or matters, can do so indirectly in a civil cause, or in these few cases in which a writ of error in a criminal case reaches it, *i.e.* that different Courts are given the final judicial authority in criminal matters, which must involve conflict or inconvenience; and (4) that no provision is made for judicial consideration of the perversity of juries in a criminal case, except in so far as the Court for Crown Cases Reserved can pronounce that there has been a **mistrial**.

**Crown Debts.**—At common law the Crown had a lien on, and could issue execution by writ of extent against, the lands and goods of its debtors by record, and this right remained to the Crown (except in one or two cases) notwithstanding that the property had passed into the hands of other persons. By 33 Hen. VIII. c. 39, practically all specialty debts due to the Crown were declared to have the like effect as debts by record; and by 13 Eliz. c. 4, the lands of accountants to the Crown (see ACCOUNTANT TO THE CROWN) were bound in respect of debts due to the Crown from the time when such persons accepted office. With regard to estates tail the Crown had not such extensive rights. If a tenant in tail became indebted to the Crown by judgment, recognisance, obligation or otherwise, and died, the Crown (being bound by the statute *De Donis*) could not issue a writ of extent against the land in the seisin of the issue in tail, but if the tenant in tail became indebted in any of the modes falling within the Statute 33 Hen. VIII. c. 39, the land could be taken against the issue in tail, but no execution could issue against a *bond fide* purchaser of such issue in tail (*Lord Anderson's case*, 1597, 7 Co. Rep. 21).

Copyholds cannot be taken in execution for Crown debts; and a sale of leaseholds by a debtor to the Crown before execution is issued is valid against the Crown. In the case of simple contract debts there appears to be no lien in favour of the Crown as against a purchaser for value without notice.

Prior to the Statute 2 & 3 Vict. c. 11, it was often difficult to discover whether lands were subject to a lien for Crown debts. Searches were usually made by purchasers at the Exchequer Office, and among the Receiver-General's bonds at the Tax Office, but there might be debts of which no record appeared in these offices, and purchasers had thus no security that their lands might not be liable to the Crown in respect of such debts. To remedy this, the Act 2 & 3 Vict. c. 11 was passed. It provided that for the future no judgment, statute, recognisance, etc., obtained by the Crown should be effective against purchasers or mortgagees of the lands of the debtors unless a memorandum of such judgment, etc., was registered in the Common Pleas; and by a later statute (22 & 23 Vict. c. 35) this registration had to be renewed every five years. By a still later statute (the Crown Suits Act, 1865) Crown debts incurred since 1st November 1865 do not affect the Crown debtor's land as against a *bond fide* purchaser for value or a mortgagee (whether such purchaser or mortgagee had or had not notice), unless a writ of execution has been issued and registered before the execution of the conveyance or mortgage to such purchaser or mortgagee, and the payment by him of the purchase or mortgage money. Registration under these Acts is now made in the Central Office of the Supreme Court.

By several statutes of the present reign the Commissioners of the Treasury and principal officers of other departments are empowered to certify that debts due to the Crown have been discharged. [See *Elphinstone and Clark on Searches*, ch. vii., and title SEARCHES.]

As to the priority of Crown debts, see ASSETS and BANKRUPTCY, *Preferential Debts*.

**Crown, Land Revenues of the.**—The possessions and land revenues of the Crown are described in the Act 10 Geo. IV. c. 50, s. 8, as consisting of "All honours, hundreds, castles, lordships, manors, forests, chases, woods, parks, messuages, lands, tithes, fisheries, franchises,

services, rents and other land revenues, possessions, tenements, hereditaments whatsoever (advowsons of churches and vicarages only excepted), which do now belong to His Majesty, or hereafter shall belong to His Majesty, his heirs or successors, within the ordering and survey of the Court of Exchequer in England or Wales, in Ireland, in the Isle of Man and its dependencies, and in the Isle of Alderney."

The land revenues as to their kind may be classified as arising mainly from the rents and profits of—

1. Lands, the absolute property of the Crown.
2. Lordships and manors.
3. Fee-farm rents in England and Wales reserved under ancient grants of the Crown, quit rents in Ireland, feu-duties, teinds and casualties in Scotland, lord's rents in the Isle of Man and ancient rents of a feudal nature, tithes and harbour dues in the Isle of Alderney.
4. Minerals in Crown lands, under foreshore and bed of the sea and in lands belonging to subjects the minerals whereof are in the Crown by exception or reservation.
5. Foreshores, waste lands, forests, franchises, and other minor sources.

The land revenues in England were first surrendered to the nation by George III. for his life in return for a civil list of £800,000 per annum (1 Geo. III. c. 1), and those in Scotland and Ireland by the Statute 1 Geo. IV. c. 1.

This arrangement, by which the reigning sovereign surrenders during his life the hereditary revenues in return for a fixed civil list, was continued by William IV. and by the Queen (1 Vict. c. 2). Under this latter statute the hereditary revenues are collected on behalf of and paid into the consolidated fund, and an annual sum of £385,000 is paid to Her Majesty.

That this arrangement has been an advantageous one for the public, the tenant for life of the income, is shown by the fact that whereas the gross income from the land revenues at the time of the accession of King George III. was about £89,000, it had increased to £124,744 for the year ending 31st March 1838; whilst for the year ending 31st March 1896 it was £519,067.

*Management.*—The Act 10 Geo. IV. c. 50 may be regarded as the Act of Settlement in regard to the possessions and land revenues of the Crown. The Act empowered His Majesty to appoint three Commissioners of Woods, Forests, and Land Revenues (reduced to two by 14 & 15 Vict. c. 42), and repealing most of the former statutes, prescribed the mode of managing the land revenues. Although amended by subsequent statutes, this Act still remains as the great authority for the management of the Crown lands.

The Commissioners of Woods, etc., are appointed by royal warrant, and exercise the statutory powers conferred upon them under the directions of the Treasury. Their powers as to leasing, selling, exchanging, etc., are as follows:—

*Leases.*—Leases may be made as under: Ordinary occupation leases for a term not exceeding thirty-one years (10 Geo. IV. c. 50, s. 22), of mines and minerals for a term not exceeding sixty-three years (36 & 37 Vict. c. 36, s. 4), and of land for building purposes, or for gardens or other appurtenances to buildings, of hereditaments the greater part of whose value consists of buildings, for ninety-nine years (10 Geo. IV. c. 50, s. 23), and of foreshore for building or reclamation works for ninety-nine years (8 & 9 Vict. c. 99, s. 1). (Subject to certain exceptions and reservations, the management of the foreshores was transferred to the Board of Trade by the Crown Lands Act, 1866, compensation being made to the land revenues in respect thereof.)



In making leases certain provisions are to be observed: generally a survey and valuation must be made, leases may be in possession or reversion; a counterpart is to be executed and the deed enrolled in the Office of Land Revenue Records and Enrolments. A rack-rent is to be reserved except that in building leases for the first three years a nominal rent may be reserved, and a fine may be taken on leases for ninety-nine years of land with buildings thereon, and on leases of tolls and other articles of uncertain produce (10 Geo. IV. c. 50, ss. 31 and 32), and on mineral leases (29 & 30 Vict. c. 62, s. 3).

The commissioners have power, with the approval of the Treasury, to release covenants and waive breaches of covenants.

The general powers of leasing given by 10 Geo. IV. c. 50 do not extend to the royal forests, parks, or chases, except where they have been made applicable by statute to land, the freehold of the Crown discharged from all rights of common, and not being land inclosed for the growth of timber, for instance, in the cases of New Forest (14 & 15 Vict. c. 76, s. 8), Dean Forest, and the forests or late forests of Woolmer, Bere, Alice Holt, Delamere, Parkhurst, Whittlewood, and Salcey (18 Vict. c. 16).

For special provisions as to leases of land for mining purposes in the Forest of Dean, see DEAN, FOREST OF; FOREST LAW.

But licences to sport may be granted over any of the royal forests or parks (10 Geo. IV. c. 50, s. 14; 29 & 30 Vict. c. 62, s. 5); and leases of any part of the forests for making railways, erecting machinery or works with licence to work minerals, may be granted for terms not exceeding thirty-one years (10 Geo. IV. c. 50, s. 97).

Crown receivers are empowered to distrain, impound, and sell, and to depute others to do the like acts (10 Geo. IV. c. 50, s. 90).

*Sales.*—The commissioners are empowered to sell or exchange any part of the land revenues in their charge except the royal forests, parks, or chases in England, and to enfranchise copyhold lands (10 Geo. IV. c. 50, s. 34).

The moneys arising from sales are to be treated as capital moneys and laid out in the purchase of other lands, or in the redemption of rights or charges existing over or on Crown lands, or invested in any one or more of the modes authorised by sec. 1 of the Trustee Act, 1893.

Corporations, notwithstanding Statutes of Mortmain, may purchase rents, manorial, forestal, or other rights charged on their lands (10 Geo. IV. c. 50, s. 39).

A survey and valuation must be made, as in case of leases, and all sales are to be enrolled in the Office of Land Revenue Records and Enrolments. As to sales of certain special portions of the royal forests, see 10 Geo. IV. c. 50, s. 98 (modified as to New Forest by the New Forest Act, 1877).

*General.*—No stamp duty is payable on any deed or other instrument connected with any purchase, sale, exchange, or lease executed by the Commissioners of Woods (10 Geo. IV. c. 50, s. 7; 8 & 9 Vict. c. 99, s. 5; 15 & 16 Vict. c. 62, s. 2).

When an instrument has been enrolled in the Office of Land Revenue Records, enrolment or registration elsewhere is unnecessary (16 & 17 Vict. c. 56, s. 6); the effect of such enrolment is to bind Her Majesty (s. 73).

Lessees and purchasers are not bound to inquire whether commissioners have complied with the conditions of 10 Geo. IV. c. 50, or to be answerable for application of purchase money (s. 74).

"Inasmuch as the land revenues of the Crown were surrendered by the reigning sovereign to the public in consideration of the civil list, and on the demise of the reigning sovereign will revert to the Crown, it is tightly

esteemed the duty of the Commissioners of Woods, etc., who represent both the Crown and the public, to preserve those revenues intact. The capital of the land revenue is the reversion of the Crown; the income belongs for the time to the public. The Commissioners of Woods are therefore bound to take care that the one is not sacrificed to the other. On behalf of the public it is their duty to obtain as large an annual income as possible from the Crown property. On behalf of the Crown, it is their duty to see that no part of the capital is sacrificed in order to increase the immediate income" (Broom and Hadley's *Commentaries*, i.).

The following are the principal Acts relating to the management of the land revenues:—

10 Geo. iv. c. 50; 2 Will. iv. c. 1; 2 & 3 Will. iv. c. 112; 3 & 4 Will. iv. c. 69; 5 & 6 Will. iv. c. 58; 5 Vict. c. 1; 8 & 9 Vict. c. 99; 11 & 12 Vict. c. 102; 14 & 15 Vict. c. 42; 15 & 16 Vict. c. 62; 16 & 17 Vict. c. 56; 18 Vict. c. 68; Crown Lands Acts, 1866, 1873, 1885, 1894.

[*Authorities.—Observations of the Land Revenues of the Crown*, London, printed for J. Debrett, 1787; *May's Constitutional History*, i.; Allen on *Royal Prerogative*.]

**Crown Office.**—The Crown Office is that department of the Central Office of the Supreme Court of Judicature wherein the administrative business on the Crown side of the Queen's Bench Division of the High Court of Justice is transacted. It is an office of great antiquity, being supposed to be as ancient as the Court of Queen's Bench itself. It derives its name from its official head, the clerk of the Crown in the Court of Queen's Bench, more commonly known by the title of Queen's Coroner and Attorney and Master of the Crown Office.

By virtue of sec. 77 of the Judicature Act, 1873, the then existing staff was transferred to the Supreme Court. By sec. 4 of the Judicature (Officers) Act, 1879, there was established a Central Office of the Supreme Court of Judicature, and by sec. 5 the Crown Office was amalgamated with it.

By sec. 8, the Queen's Coroner and Attorney and the Master of the Crown Office were made Masters of the Supreme Court; and by sec. 9, as modified by sec. 21 of the Judicature Act, 1881, provision is made as to the patronage in the case of vacancies.

Upon the occurrence of a vacancy in the office of Queen's Coroner and Attorney in the year 1892, the office was conferred, without additional salary, upon the Master of the Crown Office, pursuant to the provisions of sec. 9, subsec. (3) of the Judicature (Officers) Act, 1879. He then became sole head of the department which had previously been under the joint control of the Queen's Coroner and Attorney and the Master of the Crown Office. At the same time the office of Assistant-Master was revived.

The title of Queen's Coroner was probably acquired by this officer when it was one of his duties to hold inquests upon the bodies of prisoners dying in the King's Bench Prison; but his functions as a coroner ceased with the abolition of that prison, though the title remains.

By R. S. C., 10th January 1894, the Associates' Department of the Central Office was amalgamated for certain purposes with the Crown Office Department, and by an earlier R. S. C. of 30th January 1889, upon the abolition of the clerk of the Petty Bag, certain of the duties and powers which by virtue of the 5th sec. of the Great Seal (Officers) Act, 1874, ought to be performed by an officer of the Supreme Court were directed to

be performed by and vested in the senior clerk of the Crown Office Department.

As to the Associates' Department, see ASSOCIATE.

All causes and matters, civil and criminal, formerly in the exclusive jurisdiction of the Court of Queen's Bench, are now vested in the Queen's Bench Division (Judicature Act, 1873, 36 & 37 Vict. c. 66, ss. 16 and 34). On the Crown side the Court still retains supreme jurisdiction in all criminal matters. It takes cognisance of all crimes of whatsoever nature (4 Black. Com. 262), though, by reason of the changes in the law brought about by modern legislation, but little criminal business is now brought before it.

It also deals with certain misdemeanours by *information* exhibited either by the Attorney-General *ex officio*, or in the name of the Queen's Coroner and Attorney by leave of the Court as regulated by 4 & 5 Will. & Mary, c. 18, and Crown Office Rules, 1886, r. 46 (4 Black. Com. 303). It takes cognisance of all other criminal causes from high treason down to misdemeanour by indictment either found originally before the grand jury of the Court or removed into the Court by writ of *certiorari*.

The Court in its controlling power over all inferior or subordinate jurisdictions examines by writ of *error* the records and proceedings upon indictments or inquisitions on which judgment has been pronounced, whether at the Assizes, Central Criminal Court, or Courts of Quarter Sessions (see Bac. Abr. Error A), and by writ of *certiorari* (*q.v.*) convictions and orders of magistrates, and the proceedings of other inferior tribunals, orders of town councils for the payment of money out of the borough funds, and allowances, disallowances, or discharges of public auditors.

By information in the nature of a *quo warranto* it tries the right to offices, or franchises, the validity of an election to which cannot be the subject of a petition under the Municipal Corporations Act, 1882.

By the prerogative writ of *mandamus* it compels inferior Courts, corporations, magistrates, and others to perform any statutory or public duty which they may have refused or neglected to perform where there is no other specific legal or adequate remedy.

By writ of *prohibition* it keeps inferior Courts and magistrates within the limits and bounds prescribed to them by the laws and statutes of the realm, and prevents them from usurping a jurisdiction which they do not legally possess. By the same writ it prevents the encroachment of ecclesiastical Courts upon the civil Courts.

By writ of *habeas corpus* it liberates persons illegally confined; or admits them to bail, although legally imprisoned, if it so thinks fit, the Court having a discretion to admit to bail before conviction persons charged with any offence, whether treason, felony, or misdemeanour.

It punishes by writ of *attachment* or *committal* contempts of Court, and by writ of *contumace capiendo* (see DISCIPLINE, ECCLESIASTICAL) compels the appearance of persons cited in the ecclesiastical Courts, enforces obedience to their orders, and punishes contempts of those Courts.

It may protect a person from the violence of another by demanding sureties for good behaviour on *Articles of the Peace* (*q.v.*).

Besides the foregoing matters, which may be said to represent the original jurisdiction of the Crown Office, other proceedings have been imposed upon the Office: such are all appeals from inferior Courts, except Probate and Admiralty and Bankruptcy appeals from inferior Courts and appeals from magistrates under the Summary Jurisdiction (Married Women) Act, 1895 (see sec. 45, Judicature Act, 1873; sec. 1, subsec. (5)).

Judicature Act, 1894; R. S. C., Order 59, rr. 4 and 9 to 18); and those relating to the Petty Bag (*vide supra*).

The duties of the Queen's Coroner and Attorney or Master of the Crown Office are to exhibit pursuant to the orders of the Court informations for misdemeanours and in the nature of a *quo warranto*, and to take recognisances to prosecute the same; to direct the sheriff of Middlesex to summon a grand jury in the Queen's Bench Division when he has received notice of any business to be brought before it (35 & 36 Vict. c. 52); to call over in Court and swear the jury and attend them in their room for the purpose of reading and explaining the bills of indictment preferred before them; to attend the sittings of the Divisional Courts, to take minutes of the proceedings, and to inform the Court upon questions of practice and procedure; to administer in Court the oaths of allegiance and judicial oaths to judges and magistrates upon their appointment; to read to the Court all documents required to be read; to arraign prisoners brought to the bar of the Court to plead to indictments for treason or felony, to arraign defendants appearing personally in Court to be charged with indictments or informations for other offences, and to record the pleas of such prisoners and defendants; to attend the Court on trials at bar (see BAR, TRIAL AT); to examine upon interrogatories persons charged on writs of attachment with contempt of Court, and to report thereon to the Court; to receive and account for all fines, penalties, and other forfeitures or compositions paid into Court on behalf of Her Majesty; and to make out and deliver to the Queen's Remembrancer estreat rolls of all fines, amerciaments, and recognisances forfeited to the Crown in the Queen's Bench Division and not paid (3 & 4 Will. iv. c. 99); to keep in safe custody the records which are in the Crown Office until they are removed to the Public Record Office in accordance with the Statute 1 & 2 Vict. c. 94; to tax bills of costs between party and party in all matters arising on the Crown side, and as between solicitor and client on the same matters, and in respect of work performed in any other Courts of criminal jurisdiction or before magistrates when referred for taxation by order of a judge or master; and to perform a variety of other duties too numerous to be named here. He is assisted in the performance of his duties by the assistant-master and the clerical staff of the Crown Office.

The judicial business of the Crown side is transacted either in Court before Divisional Courts, R. S. C., Order 59, r. 1, or before the judges or the master of the Crown Office in chambers. All causes and issues of fact for trial, such as on indictments or informations—criminal or *quo warranto*—and on the prerogative writ of *mandamus*, when not tried at bar are entered either in the ordinary lists of actions for trial in London or Middlesex or at Nisi Prius at the assizes in the country according to their venues, which in criminal cases are still local.

The ministerial business on the Crown side is conducted in the Crown Office. It comprises amongst a variety of other matters the issuing of writs of *mandamus*, *certiorari*, *habeas corpus*, *prohibition*, *attachment*, various writs to compel appearances to indictments and informations, writs of *execution*, and writs of *subpoena* for the attendance of witnesses in causes on the Crown side and in other Courts of criminal jurisdiction and before justices of the peace both in and out of session, and before coroners; and also such writs as formerly issued out of the Petty Bag Office under the Common Law Seal of the Court of Chancery, such as writs for the removal and election of coroners or verderers of forests, writs of *error*, *scire facias*, *ad quod damnum*, *de contumace capiendo*, and many others which, however,

are now practically obsolete; the filing and indexing in the books kept for the purpose, the returns to such writs as are made returnable in the Queen's Bench Division or before a judge at chambers; filing and indexing indictments either found before the grand jury in the Queen's Bench Division or removed into the Court by writ of *certiorari*, and informations criminal and *quo warranto*; filing and indexing all affidavits used in proceedings on the Crown side, and filing and indexing special cases stated pursuant to C. O. R. 140 and 141, under Baines' Act (12 & 13 Vict. c. 45, s. 11), the Public Health Act, 1875, the Local Government Act, 1888, s. 29, and R. S. C., 10th August 1892, the Local Government Act, 1894, s. 70, R. S. C., 10th December 1894, and 6th April 1895, and also upon appeals from inferior Courts when in the form of SPECIAL CASE; filing recognisances, nominating and striking special juries under the old practice, C. O. R. 158; entering in the Crown paper the several proceedings on the Crown side including appeals from inferior Courts for hearing before Divisional Courts, and the entry of appeals to the Court of Appeal arising out of the proceedings on the Crown side; drawing up the orders made thereon, whether by a Divisional Court or the Court of Appeal, entering them in the proper books kept for that purpose and delivering out to the parties copies of them as required; drawing and issuing the orders made in chambers in proceedings on the Crown side; and the taxation of costs.

In the Court Order Office are entered in their proper lists the various matters on the civil side of the Queen's Bench Division to be heard before Divisional Courts in accordance with the R. S. C., Order 59, r. 1. See APPEALS.

In the same office are also entered all appeals, whether final or interlocutory, to the Court of Appeal relating to the business on the civil side of the Court, and all motions for new trials, or to set aside verdicts, findings, or judgments where there has been a trial in the Queen's Bench Division with a jury, for hearing before the Court of Appeal, pursuant to sec. 1 of the Judicature Act, 1890. Notices of motion are entered in the list of opposed motions, and special cases and points of law are set down in the special paper.

The officials of the department attend the sittings of the Divisional Courts and the Court of Appeal, when those Courts are disposing of the matters on the civil side. They call on the cases in their order, make minutes of the results, draw up and enter in books kept for the purpose the orders pronounced by the Court, and make and deliver to the parties copies thereof, as required.

The offices are open every day in the year except Sundays, Good Friday, Easter Eve, Monday and Tuesday in Easter week, Whit-Monday, Christmas Day and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving (R. S. C., Order 63, r. 6), and the hours of attendance are from eleven in the forenoon to five in the afternoon, except on Saturday, and in vacation, when the hours are from eleven in the forenoon to three in the afternoon (R. S. C., Order 63, r. 9).

[*Authorities.*—See Short and Mellor, *Crown Office Practice.*]

**Crown Paper.**—The Crown paper is the list in which the various matters on the Crown side are entered for hearing by Divisional Courts, and which are referred to under the title CROWN OFFICE (*q.v.*).

**Crown Side.**—That side of the Queen's Bench Division of the High Court which takes cognisance of criminal matters, from which issue the various prerogative writs, and to which are assigned appeals from inferior Courts. It is distinguished from the plea and revenue sides of the Court. See CROWN OFFICE.

## Cruelty—

*To Animals.*—See ANIMALS.

*To Children.*—The unlawful abandonment or exposure of a child less than two years old, to the danger of its life or permanent injury to its health, is an indictable misdemeanour, triable at Quarter Sessions and punishable by penal servitude from three to five years, or imprisonment, with or without hard labour, for not over two years, and (or) fine (5 & 6 Vict. c. 38, s. 1; 24 & 25 Vict. c. 100, ss. 27, 71; 54 & 55 Vict. c. 69, s. 1). To be unlawful the abandonment must be wilful. It has been held that the offence is committed by sending the infant as a parcel in a hamper by train (*R. v. Falkingham*, 1869, L. R. 1 C. C. R. 222), and by the father of an infant who refused to take in his child when left on his doorstep by his wife after he knew that she left it there as giving up her custody of it (*R. v. White*, 1871, L. R. 1 C. C. R. 311). As to the abandonment of children under sixteen, see 57 & 58 Vict. c. 44, s. 1, below. If death ensues from the abandonment or exposure, the offender may be indicted for murder or manslaughter (see HOMICIDE).

The ill-treatment of children in ways not included under this head, or under the heads of ABDUCTION and KIDNAPPING (see ABDUCTION; BROTHEL; RAPE), is now usually described as cruelty to children. Speaking generally, it includes assault and battery, and neglect to supply with necessary food, clothing, and medical attendance; but the exact scope of the word ill-treatment is not authoritatively ascertained.

The ordinary law as to assault and battery applies to the full to assaults on children, subject to the right of parent, guardian, or teacher to chastise for disciplinary reasons (see BATTERY; CHASTISEMENT). The Offences against the Person Act, 1861, allows (s. 43) summary conviction for an aggravated assault on a boy under fourteen, as well as on any female child, and in addition to the ordinary provisions for the costs of prosecuting assaults, authorises a direction to guardians or overseers of the poor to prosecute, at the charge of the poor rate, offences involving bodily injury to a child under sixteen, if they amount to felony, or an attempt to commit felony, or an assault with intent to commit felony.

Considerable controversy existed at one time as to the extent of the criminal liability of parents and guardians for failing to supply their children or wards with necessary food, clothing, and medical attendance. It seems now to be settled that neglect of a child of tender years, if with fatal results, amounts to homicide (*R. v. Friend*, 1802, Russ. & R. 20; *R. v. Hurry*, 1872, 76 Cent. Cr. Ct. Sess. Pap. 63; *R. v. Hines*, 1874, 80 Cent. Cr. Ct. Sess. Pap. 309; *R. v. Instan*, [1893] 1 Q. B. 450). But it was doubted whether this obligation extended to the age of emancipation under the poor law (sixteen years), or to failure to provide medical attendance (*R. v. Wagstaffe*, 1868, 10 Cox C. C. 530; *R. v. Ryland*, 1866, L. R. 1 C. C. R. 199). These doubts led to the passing of 31 & 32 Vict. c. 122, s. 37, which made a parent punishable on summary conviction by imprisonment for not over six months, with or without hard labour, if he wilfully neglected to provide adequate food, clothing, medical aid, or lodging for his child (fourteen), and in his

custody, to the risk of serious injury to the child's health. This enactment was held to apply to cases where a parent deliberately, though from a religious motive, withheld medical treatment (*R. v. Downes*, 1875, L. R. 1 Q. B. 25); but the Courts were not prepared to encourage prosecutions for manslaughter where fatal results ensued from this omission (*R. v. Morley*, 1882, 8 Q. B. D. 571).

In 1889 by the Prevention of Cruelty to Children, etc., Act, 1889, an attempt was made to render the law on this subject more stringent, and sec. 37 was repealed. In 1894 the Act of 1889 was amended, and the amendments were in the same year consolidated in the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), which is now the chief statute with respect to offences against children. Under that Act (ss. 1, 23), it is a misdemeanour for any person over sixteen, who has the custody, care, or charge of any child under sixteen, wilfully to assault, ill-treat, neglect, abandon, or expose the child (or to cause or procure the child to be so assaulted, etc.) in a manner likely to cause the child unnecessary suffering or injury to its health, including injury to or loss of sight, hearing, limb or organ, and mental derangement.

The offence may be prosecuted either on indictment or subject to the election of the accused (42 & 43 Vict. c. 49, s. 17) summarily, and whether the child is alive or dead. The punishment on conviction on indictment is fine not exceeding £100, and (or) imprisonment with or without hard labour for not over two years, and on summary conviction is fine not exceeding £25, and (or) imprisonment with or without hard labour not exceeding six months. If the offender is proved to have been interested in any money in the event of the child's death, the punishment on indictment may be increased to five years' penal servitude, or the fine to £200. The enactment does not affect the right to administer proper chastisement (s. 24).

It is also neglect by a parent within sec. 1 if when he has not the means to maintain his child he fails to apply for poor relief for the child (s. 23 (2)), by which provision the Legislature have overridden the judicial pronouncements in *R. v. Chandler*, 1855, 24 L. J. M. C. 109; *R. v. Ryland*, 1867, L. R. 1 C. C. R. 199; and *R. v. Rugg*, 1871, 12 Cox C. C. 16.

Other special provisions are also made by several Acts with respect to children. By the Infant Life Protection Act, 1872, 35 & 36 Vict. c. 38, regulations are imposed on persons taking in infants to nurse for reward. A bill was introduced in Parliament in 1896 for the repeal of this Act, and for the substitution of more effectual regulations (see BABY FARMING). By the Children's Dangerous Performances Act, 1879, 42 & 43 Vict. c. 34, children under fourteen may not be employed in any dangerous public exhibition or performance, under a penalty not exceeding £10, recoverable on summary conviction against the person who causes the child to take part in the performance, and the parent, guardian, or custodian of the child who aids or abets therein. If a child is injured in such performance, the employer is indictable for assault, and the Court of trial may award compensation not exceeding £20 for any bodily harm sustained by the child. And see DANGEROUS PERFORMANCES.

Under the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), it is also an offence, punishable on summary conviction by fine not exceeding £25, or alternatively or in default of payment by imprisonment, with or without hard labour, for not over three months—

(i) To cause or procure a child under sixteen to be in any place to be trained as an acrobat, contortionist, or circus performer, or for any exhibition or performance which in its nature is dangerous, except where

the training is under licence, or by the parent or legal guardian of the child (s. 2 (a) (iii.) (iv.)).

(ii.) To cause or procure any child under eleven to be without licence in a place licensed by law for public entertainments, or a circus or other place of public amusement to which the public are admitted by payment, for the purpose of singing, playing, or performing for profit, or offering anything for sale. Entertainments are excepted from this provision when they are not held on premises licensed for the sale of intoxicants, and the proceeds are wholly applied for the benefit of a school or a charitable object, or if in other cases a special written exemption has been obtained from a stipendiary magistrate or two justices (s. 2 (c) (i.) (iii.)). The licences as to children over seven, above referred to, are in England granted by a petty sessional Court, after notice to the police (s. 3). And the places in which the licensed child is to appear are under the supervision of the factory inspector (s. 3 (2)).

The same Act (s. 2 (a) (b)) punishes with like penalties the employment of boys under fourteen or girls under sixteen—(a) in any street, premises, or place to beg, sing, play, perform or sell; or (b) in any street or place licensed for sale of liquor, but not for public entertainment, to sing, etc., between 6 p.m. and 6 a.m.

The last-named hours may in any district be extended or restricted generally or on particular days or in particular parts of their district by by-law of the local authority (s. 2 (a) (b) (ii.)), that is to say by the town council or district council, or in London by the County Council (s. 25); which by-laws must in England conform to sec. 184 of the Public Health Act, 1875, and be confirmed by the Home Secretary (s. 22).

In the case of each of these offences the parent or person who has custody, charge, or care of the child is subject to the same penalties as the employer if he allows the child to act as prohibited.

The procedure under the Act of 1894 extends not only to the offences made punishable under that Act, but also to the following offences: (a) abandoning or exposing a child under two (24 & 25 Vict. c. 100, s. 27); (b) abduction of a girl under sixteen (same Act, s. 55); (c) stealing a child under fourteen (s. 56); (d) aggravated assaults on a girl under sixteen, or a boy under fourteen (s. 43); (e) indecent assaults on a girl under sixteen (s. 52); (f) offences under the Act of 1879 above cited; (g) any offence (not amounting to homicide) involving bodily injury to a child under sixteen.

The Act in all these cases empowers arrest by a constable without warrant (s. 4), conveyance to a place of safety, certified by the local authority (ss. 5, 25), and the making of orders as to the custody of a child after a conviction (ss. 6–8), and the grant of search warrants to remove a child who is subjected to assault or ill-treatment (s. 10), and authorises the Court, where the offender is a habitual drunkard, to order his detention under the Inebriates Acts (s. 11). See INEBRIATES ACTS.

The accused and his wife or her husband are competent but not compellable witnesses (s. 12). Children of tender years may testify without being sworn (s. 15). Their presence at the trial may be dispensed with (s. 16), and their depositions may in certain cases be taken and used at the trial (ss. 13, 14). If the child appears to the Court to be under the age specified in the charge, the burden of proving that it is over the age falls on the accused (s. 17). Special provisions are made varying those of the Summary Jurisdiction Acts as to the form of the information and the limitation of time for proceedings (s. 18), and an appeal lies to Quarter



Sessions from summary convictions, or from orders of Courts of summary jurisdiction under secs. 6, 7, 8 (s. 19). The costs of prosecution on indictment are payable as in felony (s. 20); see COSTS; *Criminal Cases, ante*. And the guardians have the same powers and duties as to assault, ill-treatment, neglect, abandonment, or exposure (s. 21) as were given them under sec. 73 of the Act of 1861 in the cases there mentioned (*vide supra*).

[*Authorities*.—Atkinson, *Mag. Ann. Pr.*, 1897, p. 271; Clarke Hall, *Law relating to Children*, 1894; Steph. *Dig. Crim. Law*, 5th ed., 219.]

*To Wife*.—See DIVORCE.

**Cul de sac.**—It was formerly held that no road could be a highway unless it was a thoroughfare; it was said that a highway must run from one public place into another. This is not so now as a matter of law. A *cul de sac* in a busy city which has for seventy or eighty years been open to the public at all hours, and paved, lighted, and cleaned by the parish, may be a public highway (*Rugby v. Merrycather*, 1790, 11 East, 375 n.; 10 R. R. 528; *Souch v. East London Ry. Co.*, 1873, L. R. 16 Eq. 108; *Vernon v. Vestry of St. James, Westminster*, 1880, 16 Ch. D. 449), though it by no means follows that every *cul de sac* even in the metropolis is a highway (*Woodyer v. Hadden*, 1813, 5 Taun. 125; 14 R. R. 706), still less a blind lane in a country parish (per Kay, J., in *Bourke v. Davis*, 1889, 44 Ch. D. at p. 123). The fact that a given road is not a thoroughfare still remains a most important fact for consideration on the question of highway or no highway. Thus in *R. v. Lloyd*, 1808, 1 Camp. 260, a court which led out of Snow Hill, Holborn, round three sides of an oblong and out again into Snow Hill, without any further outlet, but which had always been used by the public, and had been lighted (*not paved*, apparently) by the city of London, was held a highway, because it led from one part of a public street to another; while in *Wood v. Veal*, 1822, 5 Barn. & Ald. 454; 24 R. R. 454, it was held that the public had no right of way over Little Abingdon Street, Westminster, which was not a thoroughfare; although it had been lighted, paved, cleaned, and watched at public expense for more than fifty years. And see *Jarris v. Dean*, 1826, 3 Bing. 447. So again in *R. v. Hawkhurst*, 1862, 7 L. T. 268; 11 W. R. 9, a road which was barred by a park gate was held no highway, although it had been repaired by the parish from time immemorial, and although there was a public bridle-path leading through the park gate across the park to the next village. But if the *locus in quo* was ever part of a highway, it remains a highway still, although it has since been lawfully stopped or closed at one end (*Gwyn v. Hardwicke*, 1856, 25 L. J. M. C. 97; *R. v. Burney*, 1875, 31 L. T. 828).

**Cumulative Sentences (Judgment).**—An expression occasionally used as an equivalent for concurrent or successive sentences.

In the case of a conviction on several counts of an indictment or on several indictments, the Court may lawfully impose either concurrent or consecutive sentences in respect of each distinct offence of which the accused has been convicted. In the case of consecutive sentences, the imprisonment is computed from the end of each preceding term imposed by each preceding term in the series of sentences. This procedure is authorised in English law as to felonies by 7 & 8 Geo. IV. c. 28, s. 10; and has been held legal as to misdemeanours (*Castro v. R.*, 1881, 6 App. Cas. 229). It is also lawful as to offences punishable on summary conviction

(11 & 12 Vict. c. 43, s. 25; *R. v. Cutbush*, 1867, L. R. 2 Q. B. 379); but in cases of summary convictions for assault the sum of cumulative sentences of imprisonment must not exceed six months (42 & 43 Vict. c. 49, s. 18). Where one or more counts in an indictment are held bad, the cumulative sentences on the valid counts commence to run from the termination of the imprisonment on the next preceding valid count (*Gregory v. R.*, 1850, 15 Q. B. 974).

**Curator Bonis.**—A *curator bonis* duly appointed by a Scotch, foreign, or colonial Court stands in the same position as a committee in regard to suing in England in the name of the lunatic under his care or charge (cp. *Scott v. Bentley*, 1855, 1 Kay & J. 281; *Grimwood v. Bartels*, 1877, 46 L. J. Ch. 788; *Sylvia v. Da Costa*, 1803, 8 Ves. 316; *In re Barlow's Will*, 1887, 36 Ch. D. 287; *In re De Linden*; *In re Spurrier*; *De Hayn v. Garland*, [1897] 1 Ch. 453). When a person has been found lunatic by inquisition in England or Ireland, and has personal property in Scotland, the committee of the estate without cognition (as to which see Lorimer's Notes to Lindley on *Partnership*, 5th ed., pp. 808, 809, and Mackay's *Manual of Practice*, pp. 129 and 500) or other proceedings in Scotland has all the same powers as to such property or the income thereof as might be exercised by a tutor-at-law (see Bell's *Principles*, 9th ed., pp. 2103 *et seq.*) or a duly appointed *curator bonis* (*ibid.*) to a person of unsound mind in Scotland (s. 131, subs. (2) of the Lunacy Act, 1890). And similarly the tutor-at-law or curator of a lunatic having personal property in England or Ireland has without an inquisition or other proceedings all the powers (as to which see article LUNACY) as to such property or the income thereof as the committee of the estate of a lunatic so found by inquisition (*ibid.* subs. (3)).

**Curators of Roads.**—Dalton, in his *Country Justice*, c. 50, says that our surveyors of highways exactly answer to the *Curatores viarum* of the Romans, and although the complete correspondence may be doubted, it is on account of a certain similarity between them that highway surveyors have sometimes been termed curators of roads. See HIGHWAYS.

**Curia advisari vult.**—Literally, "the Court wishes to be advised." These words, which are usually abbreviated into "cur. adv. vult," or "c. a. v.," when placed after the statement of facts and the arguments in the report of a case, signify that the Court did not give a decision at once, but took time to consider its judgment.

**Currency.**—See CASH and COIN.

**Current Coin.**—See COIN.

**Cursing.**—1. It was no offence at common law to curse or swear; and such matters were dealt with, if at all, in Courts Christian (see Canons of 1603, No. 109). In 1624 (21 Jac. I. c. 20) profane cursing and swearing were made punishable with a fine of 1s., or the stocks in default of distress.

This Act being regarded as inadequate, provision was made under the Profane Oaths Act, 1745 (19 Geo. II. c. 21), for penalties varying in amount with the social degree of the offender. The penalty per oath or curse is, for a day labourer, common soldier, or common seaman, 1s.; for every other person under the degree of a gentleman, 2s.; for persons of or above the degree of a gentleman, 5s. Though any number of oaths on one occasion constitute one offence for purposes of summons, the Court may fine for each oath (*R. v. Scott*, 1863, 33 L. J. M. C. 15). The penalties go to the poor of the parish (s. 10). Constables are authorised and required to arrest persons offending in their presence, where the offender's name is unknown (s. 3). The prosecution must be within eight days next after the offence is committed (s. 12). The procedure for the offences, including that in default of paying the fine imposed, is now regulated by the Summary Jurisdiction Acts (see 47 & 48 Vict. c. 43, s. 4, sched. 1). There is no judicial decision as to what is a profane curse, and the tendency of justices is to confuse it with use of obscene language. The Act is said not to apply to cursing by women (Stone, *Justice of Peace*, 30th ed., 1023). It is still occasionally enforced, as it is not confined to cursing, etc., in streets, and applies to the whole of England and Wales, whereas the following provisions apply only to limited areas.

2. The Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 87, s. 28), makes it an offence, punishable on summary conviction, for anyone in *any street*, to the obstruction, annoyance, or danger of the residents or passengers, to use any profane or obscene language. The penalty is a fine not exceeding 40s. or imprisonment without hard labour for not over fourteen days. Constables can arrest without warrant persons offending in their presence. The Act applies to all urban sanitary districts, and to those rural districts to which it has been extended under sec. 276 of the Public Health Act, 1875 (see 38 & 39 Vict. c. 55, ss. 171, 276).

3. In the metropolitan police districts similar provisions exist under sec. 12 of the Metropolitan Police Courts Acts, 1839 (2 & 3 Vict. c. 71).

4. In some districts by-laws have been made under sec. 23 of the Municipal Corporations Act, 1882, and the Local Government Act, 1888, for punishing cursing, etc., in the interests of local peace, order, and good government, and to prevent nuisances. Such by-laws will not be valid unless they are restricted to language which causes annoyance, and is uttered in a street or public place or on private land abutting on and open to a street (*Strickland v. Hayes*, [1896] 1 Q. B. 290; *Mentle v. Jordan*, 1896, 13 T. L. R. 121).

**Curtesy (Curtesy of England; Tenant by the Curtesy).**—At common law a husband who survives a wife by whom he has had issue born alive, who inherits or might have inherited her real estate as her heir, is entitled to hold for his life all the lands and tenements of which he and she were seised in deed (see *post*) in her right for an estate of inheritance. The husband enjoying such estate is called tenant by the curtesy of England, or, more shortly, tenant by the curtesy, the original expression being "tenant by the law of England."

As to the historical origin of the custom and the meaning of the word curtesy, see Pollock and Maitland, *Hist. Eng. Law*, ii. pp. 411–417; see also Year Book, 20 & 21 Edw. I., Preface, p. xx. Certain incorporeal hereditaments, as advowsons, tithes, commons, and rents, are also subject to the curtesy. The birth of issue is not required to make a husband tenant by the curtesy

of lands subject to the custom of the county of Kent (GAVELKIND, *q.r.*); but the estate in gavelkind lands extends only to a moiety, and ceases if the husband should marry again.

The estate by the curtesy extends to lands held in fee-simple or fee-tail and in severalty, tenancy in common, or coparcenary; but not in joint tenancy. The estate does not extend to copyhold lands, but by special custom. By special custom, however, it exists in most manors; but recourse must be had to the customs of the particular manor to ascertain the quantity and extent of the interest in the lands of the wife taken by the husband. Generally, it would appear that where the custom does not require the birth of issue, the husband may take the estate, although there has been no issue of the marriage; but if the custom is silent, the rule of the common law as to the birth of issue apparently holds.

Admittance is not necessary to perfect the husband's title, his estate being regarded as a continuance of that of his wife.

The Copyhold Act, 1894 (57 & 58 Vict. c. 21, s. 21), provides that land enfranchised thereunder shall not be subject to any custom relating to tenancy by the curtesy, but shall be subject to the general law relating to freehold land; but this section does not apply to any person married before the date at which the enfranchisement takes place.

The husband's estate by the curtesy is said not to be complete until after the wife's death; but from the moment of the child's birth or the acquisition of the property by the wife, whichever event last happens, the husband is enabled to convey an estate for his life to another person. Before the birth of a child he could at common law convey a good estate only for the joint lives of himself and his wife.

The strict rule that seisin in deed (as to the difference between seisin in deed and seisin in law, see SEISIN) is required during the coverture to enable the husband to claim the estate by the curtesy applies only to land. With regard to other realty of which there is a curtesy, a seisin in law is sufficient, if circumstances be such as to make a seisin in deed impossible (*e.g.* in the case of an advowson, if the wife die before the church become void). Even with regard to lands it is not altogether clear to what extent seisin in deed is now required to establish the right (see *Co. Litt.* 29*a*; Littleton, s. 52; Challis, *Law of Real Property*, 315).

The necessity for an actual seisin is ascribed by Lord Coke to the fact that the issue must be such as may possibly inherit as heir to the wife, descent before the Wills Act (3 & 4 Will. iv. c. 106) being traced from the person last seised. Under the present law it may be argued therefore that the estate by the curtesy only arises in the case of lands which the wife took as purchaser, or that seisin in deed no longer matters (Challis, *supra*). In *Eager v. Furnivall*, 1881, 17 Ch. D. 115, where under sec. 33 of the Wills Act it was impossible for the wife to have obtained seisin, Jessel, M. R. (though the point was not raised), considered that as a general rule the seisin was still necessary (*ibid.* at p. 119), but that the rule was not absolute, and that if it was impossible to get seisin in deed a seisin in law might suffice.

On the principle that equity follows the law, Courts of equity have allowed to the husband a right analogous to curtesy in respect of his wife's equitable estate (that is, an estate where lands are vested in trustees for her and her heirs) for the same quantum and interest as if the limitations had been legal and not equitable.

It is now settled, after some doubt, that when a married woman has an equitable estate of inheritance to her separate use, and does not dispose of it by deed or will, her husband is entitled to curtesy (per Jessel, M. R.,

*Cooper v. Macdonald*, 1877, 7 Ch. D. 288; see also *Appleton v. Rowley*, 1869, L. R. 8 Eq. 139; and *Moore v. Webster*, 1866, L. R. 3 Eq. 267, which last case must be considered overruled).

A wife entitled for an estate of inheritance to her separate use can defeat her husband's interest by a disposition of the estate in the same way that a husband can defeat his wife's dower under the Dower Act (3 & 4 Will. iv. c. 105). A declaration in the settlement or will settling or devising the lands upon the wife to her separate use, that the husband shall not be tenant by the curtesy, will prevent the right from arising, and it makes no difference that the legal estate is vested in the wife (*Bennet v. Davis*, 1725, 2 P. Wms. 316). It is not, however, clear if a mere declaration by the wife of an intention to prevent the right from arising apart from any disposition of the estate, would bar it.

The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), provides (ss. 2 and 3) that the real property of a woman married after the Act, and the real property acquired after the Act by a woman married before it became law, shall be held in both cases by her as a *feme sole*. The estate by the curtesy, however, still exists (*Hope v. Hope*, [1892] 2 Ch. 336), but its character is apparently altered. It may be said that the effect of the Act has been to put all estates affected by it upon the same footing as equitable curtesy in cases where, before the Act, the wife was entitled to both income and corpus for her own separate use (Challis, *Law of Real Property*, p. 316), or that the husband takes by *quasi*-descent in the same manner as the heir (Wolstenhome, *Conveyancing and Settled Land Acts*, 7th ed., p. 248).

Under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), subs. 1, viii., a tenant by the curtesy is mentioned as a person who shall have the powers of a tenant for life under that Act. The Settled Land Act, 1884 (47 & 48 Vict. c. 18, s. 8), provides that "for the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by the wife." This section does not state what shall be supposed to be the date of the settlement, or what property it shall be deemed to comprise (see Challis, p. 327; Wolstenhome, p. 390).

In tenure a tenant by the curtesy holds immediately of the superior lord, and not of the heir.

[*Authorities*.—Coke on Littleton; Fearn, *Contingent Remainders*; Burton, *Real Property*; Williams, *Real Property*; ditto, *Conveyancing Statutes*; Challis, *Real Property*; Wolstenhome, *Conveyancing and Settled Land Acts*; Edwards, *Compendium*; Scriven on *Copyholds*; Pollock and Maitland, *Hist. Eng. Law*.]

**Curtilage** is defined in Shepherd's *Touchstone* (7th ed., p. 94) as "a little garden, yard, field, or piece of void ground lying near and belonging to the messuage." By the grant of a messuage or a messuage with the appurtenances, a house and its curtilage will pass (*ibid.*), and the grant of a cottage may extend to a curtilage (*ibid.*).

In *Marson v. London, Chatham, and Dover Ry. Co.*, 1868, L. R. 6 Eq. 101, a piece of vacant ground in front of a house, not fenced off from the street, and separated from the house only by a narrow pavement, also unfenced, which furnished the only means of approach for vehicles to the front door of the house, and which had for many years been treated as passing to the lessee by every demise of the house, was held to come within the definition of curtilage. In giving judgment, Giffard, V.C., said: "The land is no doubt convenient for the occupation of the house; the fact of principal importance being that in order to drive to the front door it is

necessary to pass over it. I must, consequently, hold it to be part of the curtilage of the house."

The phrase "premises within the same curtilage" was much discussed in two recent cases (*Vestry of St. Martins-in-the-Fields v. Bird*, [1895] 1 Q. B. 428, and *Pilbrow v. St. Leonard, Shoreditch*, [1895] 1 Q. B. 433). In the former it was held that the Lowther Arcade, which consists of a number of separate houses let to different tenants, with an open space or passage running between the two rows of houses, could not be called "premises within the same curtilage" within sec. 250 of the Metropolis Local Management Act, 1855; and in the other case, on the construction of the same section, it was decided that two separate blocks of buildings belonging to one owner and let out in sets of apartments, which were separated by a causeway or yard twenty feet wide (to which causeway or yard doors opened from the one block but not from the other), were "premises within the same curtilage."

As to curtilage within the Larceny Act, 1861, see BURGLARY, *ante*, vol. ii. p. 307.

**Custody of Infants, Lunatics, etc.** — See INFANT; LUNACY, *etc.*

## Custom.

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The term custom (*consuetudo*) is used by the older writers in a number of senses, many of which attribute to it far more extensive meanings than those it now usually bears. Thus Coke (*Co. Lit.* 110 *b*) says, "*Consuetudo* is one of the maine triangles of the lawes of England; those lawes being divided into common law, statute, and custome"; and in his *Institutes* (2 *Inst.* vol. i. p. 58), the same writer enumerates six different meanings, some of which comprise under the term both the common law and statutes. Blackstone (*Introd.*, s. 3) distributes the "unwritten or common law" under three heads:—(1) General customs which form the common law in its stricter and more usual signification. (2) Particular customs, which, he says, for the most part affect only the inhabitants of particular districts. And (3) certain

particular laws, which by custom are adopted and used by more particular Courts, as, for instance, the canon law. See also *Doctor and Student* (i. 4). The term is still used with reference to the common law generally in the phrase, "custom of the realm," in connection with the liability of persons who carry on a "common employment," as carriers, innkeepers, etc. (See CARRIER and INNKEEPER.)

There has been much discussion among writers on jurisprudence as to whether custom can be properly ranked, as it was by all the older text writers, as a source of law. Austin (4th ed., pp. 37, 304, 555) somewhat angrily maintained that it was absurd to so regard it. A custom, he argued, is not part of the law until it has been approved and adopted by judicial decision. An obvious answer to this objection is, however, usually accepted. It is that there is a general rule of law that any custom which fulfils certain ascertained conditions stated below shall be binding, and that, consequently, the judicial inquiry which leads to the decision is directed solely to the question whether the conditions are fulfilled by the alleged custom or not. (See Holland's *Jurisprudence*, ch. v., and Pollock's *First Book of Jurisprudence*, p. 10). There is no doubt that as a matter of history much of the common law has had its origin in the adoption by the judges of customs. In the last century the "custom of merchants" was gradually transferred from the region of facts to be found by the jury to that of law to be laid down by the judge (see per Buller, J., in *Lickbarrow v. Mason*, 1787, 2 T. R. 73; 1 R. R. 425; and Pollock, *op. cit.* ch. iv., and *Brandao v. Barnett*, 1846, 12 Cl. & Fin. 787).

For the purpose of this article, customs may be conveniently divided into two groups which have but little in common with each other, viz. Local Customs, and Usages. Of these the former are, for the most part, true "local laws," but certain rights which are essentially ordinary prescriptive private rights have become classified with them by reason of the technical rule that a copyholder cannot prescribe against the lord of his manor, but may claim against him by custom (see below, p. 66). The latter are current usages with reference to which, in particular cases, parties are taken to have regulated their agreements or conduct, and which have to be considered in deducing the legal obligations arising out of such agreements or conduct. Customs (or usages) of trade are the type of the second group. Besides the usages particularly considered in the latter part of this article, there are many other usages, forming part of the common course of affairs, of which evidence may be given, or notice taken in Courts of law. These are more appropriately referred to under other titles. The "rule of the road," for instance, belongs to the head of NEGLIGENCE.

A. LOCAL CUSTOMS.—"A custom, as understood in law, is usage which hath obtained the force of law, and is in truth a binding law for the particular place, persons, and things concerned. A custom is a reasonable act, iterated, multiplied, and continued by the people from the time whereof memory serves not" (Dav. Rep., case of *Tanistry*, p. 32).

There are certain customs, such as "gavelkind" and "borough English" (*q.v.*), of which the law takes notice that such customs actually exist, so that in any case it is only necessary to prove the applicability of the custom in question (Black. Com., Introd. s. 3, *Co. Lit.* 175 b, and *ibid.*, note 42).

A great variety of borough and county customs formerly existed, especially with reference to the devolution of property upon death (see LONDON, YORK, and WILL). Most of these are now abolished or have lost their importance.

• The most important local customs remaining are customs under which

the inhabitants, or freeholders, or some other specified class of persons in a given district have rights of the nature of easements over waste land, customs regulating the enjoyment of rights of common, and the mining customs existing in some parts of the country. Examples are referred to below, and very numerous examples will be found collected in Gale on *Easements* (6th ed., p. 3), Williams on *Commons* (*passim*), and Comyn's *Digest* (Copyhold, S.). A valuable collection of manorial customs will be found in Watkins on *Copyholds*, 4th ed., ii. pp. 477 *et seq.* See also Scriven on *Copyholds*.

*Custom and Prescription.*—Prescription and custom in many instances run very nearly together. The distinction between them is that a prescription is personal, a custom local. "In the common law a prescription, which is personal, is for the most part applied to persons, being made in the name of a certain person and his ancestors, or those whose estate he hath, or in bodies politique or corporate and their predecessors; and a custom, which is local, is alledged in no person, but layd within some mannor or other place" (*Co. Lit.* 113 *b*); and in *Gateward's case* (6 Co. Rep. 60 *b*) a "difference was taken and agreed between a prescription, which always is alledged in the person, and a custom, which always ought to be alledged in the land. For every prescription ought by common intentment to have a lawful beginning, but it is otherwise of a custom; for that ought to be reasonable and *ex certa causa rationabili usitata*." See also Williams on *Commons*, p. 279. For the forms in which a prescription and a custom were respectively pleaded, see *Co. Lit.* (*ubi supra*) and the cases cited below.

Claims to the same right by prescription and by custom are therefore usually inconsistent, for they allege the right to be, or to have been, vested in persons differently ascertained, and therefore usually in different persons (*Blewett v. Treggoning*, 1835, 3 Ad. & E. 554 at p. 588; see further below, *Evidence*).

The following rules, numbered 1 to 9 inclusive, are taken from Blackstone (Introd. s. 3).

1. The custom "must have been used so long that the memory of man runneth not to the contrary" (that is to say, since the year 1 Richard 1). "So that, if any one can show the beginning of it, it is no good custom."

The corollary last quoted to this rule has been abolished by the Prescription Act in cases where the Act applies (see below).

Evidence of the prevalence of the alleged custom for twenty years before the action is sufficient to raise a presumption that it is of sufficient antiquity, unless there is something to suggest the contrary (*R. v. Jolliffe*, 1823, 2 Barn. & Cress. 54; 26 R. R. 264), and except in the cases falling within the Prescription Act, sec. 1 (see below). The jury should be directed that from long uninterrupted modern usage, they ought to presume that the right has had an immemorial existence, unless they are satisfied by evidence to the contrary (see per Parke, B., in *Jenkins v. Harvey*, 1835, 1 C. M. & R. at pp. 884, 894; 2 C. M. & R. 393). Where the Prescription Act does not apply, such evidence to the contrary may be given by showing that the custom cannot have prevailed before a date subsequent to 1189. Thus a custom to erect a stall for the refreshment of labourers attending a statute sessions for hiring servants must have arisen later than the statute of Elizabeth by which the sessions themselves were instituted (*Simpson v. Wells*, 1872, L. R. 7 Q. B. 214). It may also be given by showing from the nature of the right claimed that it cannot have been enjoyed in early times. Most of the cases under this head turn upon the change in the value of money, of which the Court takes judicial notice (see next case), and the actual decisions are difficult to reconcile. In *Bryant v. Foot*



(1868, L. R. 3 Q. B. 497) the claim for a customary marriage fee of 13s. was rejected, although proof was given of payment for sixty years, on the ground that in the reign of Richard I. the amount would have been too large for the parishioners to pay. In *Lawrence v. Hitch* (1868, L. R. 3 Q. B. 521), decided by the same judges, a customary toll of 1s. per load of vegetables brought to Cheltenham market, and proved to have been paid for the same period, viz. sixty years, was upheld. In the latter case the toll was also claimed and supported as a toll of "reasonable amount." (See further the authorities cited in these cases.)

The absence of evidence of enjoyment within living memory is some evidence against the alleged custom (see *Jenkins v. Harvey*, *supra*, 2 C. M. & R. 393, and below 2).

2. It must have been continued without interruption. "This must be understood with regard to an interruption of the *right*; for an interruption of the *possession* only for ten or twenty years will not destroy the custom" (so *Co. Lit.* 113 b).

3. "It must have been peaceable, and acquiesced in, not subject to contention and dispute."

4. "It must be reasonable; or rather, taken negatively, not unreasonable" (*Co. Lit.* 140 b; the case of *Tenistry*, Dav. Rep. 31, as to which see Maine's *Early History of Institutions*, *passim*).

The question whether the right claimed is reasonable or not is one of law for the Court (*Wilson v. Hoare*, 1839, 10 Ad. & E. 236). A great many authorities exist as to what is reasonable within this rule (see Bac. Abr. *Custom*, and Comyn's *Digest*, Copyhold, S., and the authority cited in the cases quoted below).

A custom relating to land which is destructive of the land itself, or of the whole enjoyment of it by the owner, is unreasonable. Thus for all comers to play games, or to walk for recreation upon it (*Fitch v. Rawling*, 1795, 2 Black. H. 393; 3 R. R. 425; *Dyce v. Hay*, 1852, 1 Macq. H. L. Cas. 305; see also *Bourke v. Davis*, 1889, 44 Ch. D. 110, and *Edwards v. Jenkins*, [1895] 1 Ch. 308); or for the inhabitants of a parish to exercise horses on lands lying without the parish at all reasonable times (*Sowerby v. Coleman*, 1867, L. R. 2 Ex. 96); or for customary tenants of a manor to dig grassy turf from the waste to improve their gardens (*Wilson v. Willes*, 1806, 7 East, 121; 8 R. R. 604). So is a custom for the lord of a manor to dig mines and let down the surface of a copyholder's holding, paying no compensation for houses destroyed thereby (*Hilton v. Granville*, 1845, 5 Q. B. 701), or to lay rubbish where he pleases near to the mouth of the mine (*Wilkes v. Broadbent*, 1744, Wils. 63). A custom for the lord to make grants of the waste with the consent of the homage, is good, though sufficiency of common is not left (*Ramsay v. Cruddas*, [1893] 1 Q. B. 228).

But customs for all the inhabitants of a village to dance upon a particular close at all times of the year (*Abbot v. Weekly*, 1665, 1 Lev. 176; *Hall v. Nottingham*, 1875, 1 Ex. D. 1); for the inhabitants of a parish to play all lawful games at all reasonable times (*Fitch v. Rawling*, 1795, 2 Black. H. 393; 3 R. R. 425; *Bell v. Wardell*, 1740, Wils. 202); for freemen and citizens of a town, on a certain day, to hold horse races (*Mounsey v. Ismay*, 1865, 1 H. & C. 729; 3 H. & C. 480); for all victuallers to erect booths on the waste of a manor at fairs (*Jyson v. Smith*, 1837, 6 Ad. & E. 745; 9 Ad. & E. 406) (see Gale on *Easements*, 6th ed., p. 3, where these cases are collected), have been allowed.

Such rights as those last referred to are carefully restricted by the law. They cannot exist in the public generally, but must be confined to the

inhabitants, or some class of the inhabitants of a particular district (*Dyce v. Hay*, 1852, 1 Macq. H. L. Cas. 305; *Bourke v. Davis*, 1889, 44 Ch. D. at p. 120; *Edwards v. Jenkins*, [1896] 1 Ch. 310). Village greens and recreation grounds have been protected by a number of statutes; see Index of Statutes, under title, "Common, England, 4 (b)," and COMMON.

A custom is unreasonable "if it be to a general prejudice for the advantage of a particular person" (Com. Dig., Copyhold, S. (13), Dav. Rep. 33 a), as, e.g., a custom that no commoner shall put his cattle on the common till the lord has put his cattle there (*ibid.*), or that the lord shall take cattle of a stranger *levant and couchant* upon the land for a heriot (*ibid.*). But this rule has not prevented the recognition of such customary obligations (correlative to prescriptive rights) as the obligations for all inhabitants within a manor to bake their bread at the lord's bakehouse (*City of London's case*, 8 Co. Rep. 125 b), or to grind their corn at his mill (*Hex v. Gardiner*, 1614, 2 Bulst. 195), or the obligations connected with "frank foldage," and "fold course" (see Williams on *Commons*, pp. 275-280).

Numerous other miscellaneous cases, not reducible to rule, are to be found in the books, in which customs have been rejected as unreasonable (see the Digests, s.r. Custom), and it is probably safe to say that no custom for a claim of a description not already recognised by law in any reported case would now be allowed. As examples of these miscellaneous cases it is sufficient to refer to the great case of *Tanistry* (Dav. Rep. 32), in which the Brehon law of succession by the *senior et dignissimus* of the blood and surname of the last owner was held to be a bad custom; the rule that no one must be judge in his own cause, so that a custom for the lord of a manor to levy a fine at will is bad (Dav. Rep. 33 a, Littleton, S. 212; *Wood v. Loreatt*, 1796, 6 T. R. 511); and the decision that the customary jurisdiction of "foreign attachment" was unreasonable (*Mayor, etc., of London v. Cox*, 1866, L. R. 2 H. L. 239).

In determining in any case whether an alleged custom is reasonable or not, extreme and improbable cases of unreasonable exercise of the right claimed are not to be regarded. Thus a custom for all victuallers to erect booths at a fair upon the waste, each paying 2d. to the lord of the manor, was allowed in spite of an objection that an inconvenient number of victuallers might claim to come (*Jyson v. Smith*, 1837, 9 Ad. & E. 406).

It has been said that the unreasonableness of a custom only proves that it must have arisen from accident or indulgence (per Lords Cranworth and Wensleydale in *Marquis of Salisbury v. Gladstone*, 1861, 9 H. L. at pp. 701 and 705), but the cases show that the rule is more than a rule of evidence. An "unreasonable" custom cannot be established by the most cogent proof of immemorial and undisputed prevalence.

5. "Customs ought to be certain." "A custom to pay 2d. an acre in lieu of tithes is good; but to pay sometimes 2d. and sometimes 3d. is bad for its uncertainty." "Yet a custom to pay a year's improved value for a fine on a copyhold estate is good; though the value is a thing uncertain; for the value may at any time be ascertained; and the maxim of law is *id certum est, quod certum reddi potest*" (Blackstone, l.c.). A custom to glean is bad on this ground (*Steel v. Houghton*, 1788, 1 Black. H. 51; 2 R. R. 715), and so is a custom to take grassy turf for the improvement of gardens (*Wilson v. Willes*, 1806, 7 East, 121; 8 R. R. 604), there being in neither case a definite limit of the extent to which the right might be exercised.

This fifth objection is usually only a case of the fourth.

6. "Customs, though established by consent, must be (when established)"

compulsory, and not left to the option of every man whether he will use them or no." Cp. below, *B. 2*.

7. "Customs must be consistent with each other." This rule is substantially a corollary to the first three, since there cannot be, in the same place, inconsistent immemorial usages both peaceably continued. It was laid down in *Aldred's case* (9 Co. Rep. 58 *b*) that to an action based on prescriptive rights to light, a custom to build so as to obscure a neighbour's windows could not be pleaded (see *ibid.* note *c*). This was because the plea amounted to a denial of the prescription, which could only be done by a traverse. Accordingly a second custom might have been pleaded, without a traverse, if it were not inconsistent with that upon which the plaintiff declared, but merely a qualification of it (*Weeks v. Sparke*, 1813, 1 M. & S. 679; 14 R. R. 546; *Kinchin v. Knight*, 1749, 1 Wils. 253; *Parkin v. Radcliffe*, 1798, 1 Bos. & Pul. 282, 393).

8. Customs, being in derogation of the common law, must be construed strictly (*Richardson v. Walker*, 1824, 2 Barn. & Cress. 827, per Bayley, J., at p. 839). A custom for an infant of fifteen years to make grants by feoffment, for instance, does not extend to enable him to convey his lands in any other way (Blackstone, *l.c.*, Co. Copyholder, S. 43). So a custom for the eldest sister to inherit will not be construed to extend to the eldest niece (*Denn v. Spray*, 1786, 1 T. R. 466; 1 R. R. 250).

9. "Customs must submit to the king's prerogative," so that if gavel-kind lands pass to the Crown, they descend to the king's eldest son (*Co. Lit.* 15 *b*, puts this rule upon the *jus coronæ*).

10. No custom is binding which conflicts with a general statute. Thus a custom to weigh 18 oz. to a lb. is bad (*Noble v. Durrell*, 1789, 3 T. R. 271; see below, *B. 6*). The progress of statute law has, in fact, greatly diminished the extent and importance of customary rights. Thus, the interests which widows and children had in many places in the personal estate of a testator, indefeasible by his will, and all the local customs with regard to wills have been abrogated (see Williams, *Executors*, 8th ed., pp. 3, 15, 33).

11. A profit *à prendre* (or right of common) cannot be claimed by custom (*Attorney-General v. Mathias*, 1858, 27 L. J. Ch. 761; *Bailey v. Stevens*, 1862, 12 C. B. N. S. 91). Thus "inhabitants" cannot have common of pasture in a close, since they cannot prescribe as inhabitants, for prescription must be personal (see above, *Custom and Prescription*), and under the present rule they cannot claim by custom (*Gateward's case*, 6 Co. Rep. 59 *b*).

• On this ground customs for "poor householders" to carry away rotten branches (*Selby v. Robinson*, 1788, 2 T. R. 758; 1 R. R. 615); for "inhabitants" "or occupiers" to cut underwood (*Lord Rivers v. Adams*, 1878, 3 Ex. D. 361; *Chilton v. Corporation of London*, 1878, 7 Ch. D. 735), or to fish in a river (*Goodman v. Mayor of Saltash*, 1882, 7 App. Cas. 633; *Tilbury v. Silva*, 1890, 45 Ch. D. 98), or to take stones from a close to repair the highways (*Constable v. Nicholson*, 1863, 14 C. B. N. S. 230), have been held to be bad.

But this rule is subject to the exception that copyholders can claim rights of common in the waste of the manor against the lord, by custom. It was resolved in *Gateward's case* (6 Co. Rep. 60 *b*) that copyholders, in fee or for life, may by custom of the manor, have common in the demesnes, but then they ought to allege the custom to be *quod quilibet tenens customarius cujuslibet antiqui messagii customar, etc.*, and not *quod quilibet inhabitans infra aliquod antiquum messagium customar, etc.* For the copyholder cannot, in this case, prescribe in the name of the lord, as he does when he

claims rights by prescription outside the manor; for the lord cannot claim common in his own soil, and therefore of necessity such custom ought to be alleged (*ibid.*, see notes to *Potter v. North* in 1 Wms. Saunders, and PRESCRIPTION).

The rule which prevents title to a "profit" being made by custom has often occasioned much difficulty in supporting a legal claim to rights, proved to have been enjoyed, in fact, for long periods. It is a well-settled principle that a lawful origin must, if reasonably possible, be presumed for rights so enjoyed (see *Haigh v. West*, [1893] 2 Q. B. 19; *L. and N.-W. Ry. Co. v. Fobbing*, [1897] 66 L. J. Q. B. 127, and the cases next cited). The Courts will not presume that the rights were created by a lost Act of Parliament (*Chilton v. Corporation of London*, 1878, 7 Ch. D. 735), but, short of this, they have gone very far. For instance, by presuming a Crown grant which operated to incorporate the grantees to such extent as to enable them to profit by it (*Willingale v. Maitland*, 1866, L. R. 3 Eq. 103; see *Lord Rivers v. Adams*, 1878, 3 Ex. D. 361, and the next case), or a declaration of a trust by, or grant upon trust to, a corporation, or other person capable of holding the right in question, in favour of the "inhabitants" or other body for whom it is claimed (*Goodman v. Mayor of Saltash*, 1882, 7 App. Cas. 633; *Wilson v. Barnes*, 1885, 38 Ch. D. 507). The claim in *Lord Rivers v. Adams* (*supra*) to a right of lopwood made on behalf of "inhabitants" was regarded by the Court as inconsistent with the acknowledged rights of the tenants of the manor.

A right to enter upon land and take water from a well is not a profit within this rule, but an easement. A custom for the inhabitants of a township to exercise such right can accordingly be supported (*Race v. Ward*, 1855, 4 El. & Bl. 702).

*Evidence.*—Customs which affect a large number of persons, and are therefore in the nature of public rights, may be proved by evidence of common reputation (Taylor, ss. 609–620; *Weeks v. Sparke*, 1813, 1 M. & S. 679; 14 R. R. 546; *Cress v. Barrett*, 1835, 1 C. M. & R. 919; *Lord Duaraven v. Llewelllyn*, 1850, 15 Q. B. at p. 811), or of declarations of deceased persons interested in the rights claimed, or by depositions, judgments, or other proceedings in former litigation between different parties, in which the alleged custom was discussed (*Freeman v. Phillips*, 1816, 4 M. & S. 486; 16 R. R. 524; *London City v. Clarke*, 1692, Bull. N. P. 233 a; *Reed v. Jackson*, 1801, 1 East, at p. 355; 6 R. R. 283; *Earl de la Warr v. Miles*, 1880, 17 Ch. D. 535; Taylor, s. 1683), or from public documents, as Court Rolls (*l.c.*), presentments of the homage or ancient customals (*Denn v. Spray*, 1786, 1 T. R. 466; 1 R. R. 250; *Bebec v. Parker*, 1792, 5 T. R. 26; *Chalman v. Cowtan*, 1810, 13 East, 10; *Anglesey v. Hatherton*, 1842, 10 Mee. & W. 218; *Duke of Portland v. Hill*, 1866, L. R. 2 Eq. 765). The absence of reference to a custom in an ancient customary may be conclusive against its antiquity (*l.c.*). And in an action against the lord of the manor, a tenant is entitled to see the Court Rolls, as they may prove his customary right (*Warwick v. Queen's College, Oxford*, 1867, L. R. 3 Eq. 683). Evidence of the existence of the custom in a place neighbouring to that in question is admissible if there is reason to infer that like customs prevailed in both (see Taylor, s. 320; *Anglesey v. Hatherton*, *supra*). A statement in a book of history, *e.g.* Camden's *Britannia*, is not evidence to prove a local custom (*Stainer v. Droitwich*, 1695, 1 Salk. 281).

Evidence that persons other than those belonging to the class in whose right the plaintiff claims, have exercised the rights claimed in the same manner as persons belonging to the class, is admissible to rebut the pre-

sumption of a customary right in the class which evidence of user by them might otherwise give rise to (see per James, L.J., in *Earl de la Warr v. Miles*, 1881, 17 Ch. D. 535; *Lord Rivers v. Adams*, 1878, 3 Ex. D. 361).

*The Prescription Act.*—Lord Tenterden's Act (2 & 3 Will. IV. c. 71 (s. 1)) provides that no claim which may be lawfully made at the common law by custom, etc., to any right of common or profit or benefit to be taken and enjoyed from or upon any land of the Crown or other owner (except tithes, rent, and services), actually taken and enjoyed by any person claiming right thereto for the period of thirty years, without interruption submitted to for one year after notice of the interruption (the period being reckoned back from the commencement of the action (s. 4)), shall be defeated by showing that the right or benefit was first taken or enjoyed at any time prior to the thirty years, but nevertheless the claim "may be defeated in any other way by which it is now liable to be defeated" (e.g. by proof that the servient owner was forbidden by law to grant the right prescribed for (*Rochdale Canal Co. v. Gardiner*, 1852, 18 Q. B. 287; *Mill v. Commissioners of the New Forest*, 1856, 18 C. B. 60)). And further, that when such right, profit, or benefit shall have been so taken and enjoyed for sixty years, the right shall be deemed to be absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. The second section contains similar provisions as to a claim to any way or other easement, or to any watercourse, or the use of any water, but with periods of twenty and forty years instead of thirty and sixty respectively. Sec. 6 enacts that in the several cases provided for by the Act no presumption shall be made in favour of any claim on proof of enjoyment for less than the specified period. The Act contains savings in reckoning the shorter periods while the person who might resist the claim is an infant, *non compos mentis*, a married woman or tenant for life, and during the pendency of any suit which is diligently prosecuted (s. 7). As regards claims to easements, it adds to the period of forty years the time when the servient tenement was held for life or under a lease exceeding three years (s. 8).

In order to establish a right under the Act it is only necessary to show that the benefit claimed has been actually enjoyed by the claimant (or his predecessors) for the requisite period as of right and not by permission, and that the right claimed is one which could have a legal origin by custom, prescription, or grant (*Earl de la Warr v. Miles*, 1881, 17 Ch. D. 535).

The statute does not extend to customary rights of recreation (*Mounsey v. Ismay*, 1865, 3 H. & C. 486), or to customary rights "in gross" at all (*Shuttleworth v. Le Fleming*, 1865, 19 C. B. N. S. 687; see the note in Gale on *Easements*, 6th ed., p. 183). In *Mounsey v. Ismay* (*supra*), Martin, B., said, "What we think Lord Tenterden (the draftsman of the Act) contemplated were incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment, and not customs for mere pleasure." It has also been determined that the Act does not apply to rights claimed by a copyholder to be exercised on his own tenement according to the custom of the manor (*Hamner v. Chance*, 1865, 34 L. J. Ch. 413), and accordingly the custom alleged in the case cited was allowed to be established by evidence of less than thirty years' enjoyment.

These decisions probably leave no operation to the Act in respect of claims by custom, other than the claims by copyholders to rights in the waste of the manor, which, as already pointed out, are really prescriptive, not customary rights. In some cases, however, other rights have been supported as customary rights within the Act. For instance; a claim

for the tanners and miners of Cornwall to wash their ore in, and cast rubbish into streams flowing by or through the workings (*Cargill v. Lovering*, 1857, 1 H. & N. 784). The customs pleaded in this case were held to be good as such, but the question whether the Act applied was not raised. And in *Pritchard v. Powell* (1845, 10 Q. B. 589) a claim to common *pur cause de vicinage* by custom, was held to be within the Act.

See further as to the Act, Gale on *Easements*, c. 4; Goddard on *Easements*, 5th ed., pp. 26, 189 *et seq.*; and *PRESCRIPTION*.

**B. USAGES.**—Evidence of the existence of customs or usages in a particular trade or market is admissible to import into contracts made with reference to such trade or market incidents, or additional terms, which the evidence shows to be usual, provided these are not repugnant to the expressed terms of the contract; and also to explain the meaning of expressions used in the contract. The principle upon which this evidence is admitted is that the parties did not mean to express the whole of the contract by which they intended to be bound, but to contract with reference to known usages (per Parke, B., in *Hutton v. Warren*, 1836, 1 Mee. & W. 466). Eminent judges have often protested against the adoption of a principle which involves a departure from the actual contract made, but the rule has long been definitely settled (see per Lord Denman in *Trueman v. Loder*, 1840, 11 Ad. & E. at p. 597; and see *Humphrey v. Dale*, 1858, El. B. & E. 1004; *Hutchinson v. Tatham*, 1873, L. R. 8 C. P. 482). The leading authority upon this rule is the case of *Wigglesworth v. Dallison*, 1779, Doug. 201, and the notes thereto in 1 Smith, L. C. In the case cited it was held that a tenant was entitled by the custom of the country to re-enter after the expiration of his lease in order to take a waygoing crop.

1. The usage need not be ancient. Trade usages, for instance, are constantly coming into existence, and they change from time to time. (See, for instance, the evidence cited in the judgment in *Willans v. Ayres*, 1877, 3 App. Cas. at p. 143.) They are, as already pointed out, binding on parties because the parties are presumed to have intended to be bound by them, and not, as in the case of the custom referred to in the earlier part of this article, as being law. In some instances very widespread and general usages do become received into the law (see the judgment of Cockburn, C.J., in *Goodwin v. Roberts*, 1875, L. R. 10 Ex. at p. 351; and *ante*, p. 62), although this happens less often now than formerly, but mercantile usages which have frequently been proved are sometimes judicially recognised as existing facts, without evidence of their continued existence (*Ex parte Powell*, 1875, 1 Ch. D. 501; *Ex parte Turquand*, 1885, 14 Q. B. D. 636).

2. The usage must be general. That is to say, it must be the rule in all cases to which it is applicable, and where it is not expressly, or by implication, excluded by the parties (*Wildy v. Stephenson*, 1882, C. & E. 3; *Nelson v. Dahl*, 1879, 12 Ch. D. at p. 576, per Jessel, M. R.; *Willans v. Ayres*, 1877, 3 App. Cas. at p. 145). Evidence of a number of instances in which the alleged usage has been acted upon must usually be given (*Mackenzie v. Dunlop*, 1856, 3 Macq. H. L. Cas. 22)—that is, unless the usage is judicially recognised (see last paragraph)—and the witnesses should be asked whether they know of actual instances where the rule has been followed in disputed cases (per Mathew, J., in *Knight v. Cotsworth*, 1883, C. & E. 48). A practice which is merely common, but is not the definite and binding rule, is not a usage to be imported into a contract, or referred to, to govern its construction (*loc. cit.* *Abbott v. Bates*, 1874, 43 L. J. C. P. 150).

So the custom of the landlord's estate, which is not the "custom of the

country," cannot be imported into an agreement of tenancy, unless it is shown to have been known to the tenant (*Womersley v. Dally*, 1857; 26 L. J. Ex. 219). Even if it was so known the case would not, it is submitted, fall within the principle by which usages are incorporated, but the provision of the custom might be found as a fact to have been agreed to be part of the contract, or to be a tacit agreement collateral to it. The same explanation must be given of the admission of evidence of former transactions between the same parties; it goes to show what they intended (*Bourne v. Gatliff*, 1844, 11 Cl. & Fin. 45; *Cumming v. Shand*, 1860, 5 H. & N. 95). Such admission is, of course, subject to the condition that evidence must not be repugnant to the contract as expressed (*Ford v. Yates*, 1841, 2 Man. & G. 549, and see below 5.).

3. The usage must be reasonable (*Pearson v. Scott*, 1878, 9 Ch. D. 198; *Perry v. Burnett*, 1885, 15 Q. B. D. 388); and a usage which alters the nature of the contract is unreasonable, as, for instance, if it enables the other party to settle the account with the agent of the contracting party by set-off of the agent's personal debt (*Pearson v. Scott*, *supra*; see also *Robinson v. Mollett*, 1874, L. R. 7 H. L. 802, cited under BROKER). But if a party knows that a usage prevails in a particular market, and he chooses to deal there either personally or through a broker, without expressly excluding it, the Court would be very reluctant to find the usage so unreasonable as not to bind him (see last case and *Perry v. Barnett*, *supra*). Evidence may be given to show that a usage relied on is unreasonable (*Bottomley v. Forbes*, 1838, 5 Bing. N. C. 128), not only because the Court may decide that it is too unreasonable to be imported into the contract, but also because the jury may decline to find the existence of the usage as a fact (*l.c.*). But if the parties have agreed to incorporate a particular usage in their contract, it is immaterial whether the usage is reasonable or not (*Stewart v. West India Steamship Co.*, 1873, L. R. 8 Q. B. 68, 362).

4. It is not necessary that the party bound should have known of the usage, if he dealt in the market where it prevailed, or authorised his agent to deal there (*Sutton v. Tatham*, 1839, 10 Ad. & E. 27; *Bayliffe v. Butterworth*, 1847, 1 Ex. Rep. 425). The statement to the contrary in *Kirchner v. Venus* (1859, 12 Moo. P. C. 361) is incorrect (see *Buckle v. Knoop*, 1867, L. R. 2 Ex. 125; *Steamship Co. Norden v. Dempsey*, 1876, 1 C. P. D. 662; see 1 Smith, *L. C.*, 10th ed., 547 *et seq.*).

5. The usage must not be repugnant to the expressed terms of the contract, or to a necessary implication from them (*Myers v. Sarl*, 1860, 3 El. & El. 306); for, as stated in the passages cited at the top of this division of the article, evidence is only admissible upon the presumption that the parties contracted with reference to it, and upon the assumption that the terms of the contract as expressed by them "were intended to be supplemented by all those general and varying incidents which a uniform usage would annex" (*Humphrey v. Dale*, 1857, 7 El. & Bl. 266; El. B. & E. 1004). A usage, for instance, by which a warranty of "prime bacon," means "bacon with an average taint," is bad, because it contradicts the contract (*Yates v. Pym*, 1816, 6 Taun. 446; 16 R. R. 653; see also *Hutchinson v. Tatham*, 1873, L. R. 8 C. P. 482). A great number of decisions as to what is a repugnancy or inconsistency within the meaning of this condition are collected in the note in Smith's *Leading Cases*; in the appendix to Chalmers on *Sale*; in Balfour Browne on *Customs*, pp. 60-62; and, as regards agricultural customs, in Woodfall, *Landlord and Tenant*, and Dixon, *Law of the Farm*. Some examples are given below.

The usage may add terms to the contract, but, if it is in writing, only provided they are incidental to its expressed provisions (*Philips v. Briard*, 1856, 1 H. & N. 21). For instance, a term to give a tenant a waygoing crop (*Wigglesworth v. Dallison*, *supra*), or to allow a discount for cash (*Brown v. Byrne*, 1854, 3 El. & Bl. 703), or to make iron warrants pass by delivery free of the vendor's lien (*Merchant Banking Co. v. Phoenix Bessemer Co.*, 1877, 5 Ch. D. 205). This is the most common operation of an incorporated usage. The Statute of Frauds, where the contract falls within it, does not exclude this evidence (*Humphrey v. Dale*, *infra*).

It may negative or vary any incident attached by law to the contract, which may be varied by agreement (Sale of Goods Act, 1893, s. 55).

It may add the liability of a new party, *e.g.* that of the broker (*Humphrey v. Dale*, 1857, 7 El. & Bl. 266; El. B. & E. 1004). See **BROKER** and **FACTOR**.

It may attach a special meaning to terms employed, *e.g.* that the "Baltic" includes the Gulf of Finland (*Udell v. Walters*, 1812, 3 Camp. 16; 13 R. R. 737), or that "1000" rabbits means "1200" (*Smith v. Wilson*, 1832, 3 Barn. & Adol. 728). See the very numerous instances collected in the authorities referred to above. But words of "general import" cannot be so interpreted as to bear a meaning inconsistent with their natural signification, *e.g.* the words 300 "more or less" to mean so much as 345 (*Cross v. Eglin*, 1831, 2 Barn. & Adol. 106); or "cargo" to include steerage passengers (*Lewis v. Marshall*, 1844, 7 Man. & G. 729). But in *Alcock v. Leckie*, 1883, C. & E. 98, Mathew, J., admitted evidence that "say about 5000 barrels" meant as much as 10 per cent. excess; and in *Myers v. Surl*, 1860, 3 El. & El. 306, the Court of Queen's Bench held that evidence to show that "weekly account" in a building contract meant "an account of day work and materials expended on alterations." But usage cannot attribute to words which have a definite statutory meaning any other meaning, *e.g.* to vary the statutory weights or measures (*Noble v. Durrell*, 1789, 3 T. R. 271; *Smith v. Wilson*, 1832, 3 Barn. & Adol. 728).

6. Usage cannot alter or control the law, for instance, by making an instrument negotiable (*Crouch v. Crédit Foncier*, 1873, L. R. 8 Q. B. 374), or by disregarding the provision of Leeman's Act relating to the sale of bank shares (*Perry v. Barnett*, 1885, 15 Q. B. D. 388). See **BANK SHARES**.

7. If the contract is in writing, evidence cannot, it appears, be given of a parole agreement to exclude the incorporation into it of a customary incident (1 Smith, L. C., 559; *Faukes v. Lamb*, 1862, 31 L. J. Q. B. 98).

In addition to the text-books referred to above, see also *Ruling Cases* (s.v. "Custom"); Balfour Browne, *Usage and Custom*; and Wood, *Mercantile Agreements*; and, for American law, Lawson, *Usages and Customs*.

*Custom of the Country.*—The agricultural customs and usages of a district, with reference to which farm leases and tenancies are interpreted (see above, B.), are compendiously described as the custom of the country. Such customs relate chiefly to modes of cultivation and compensation for improvements on quitting. As regard the latter, the Agricultural Holdings Act, 1883, s. 57, provides that the tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorised by the Act in respect of any improvement for which he is entitled to compensation under the Act; but where he is not entitled to compensation under or in pursuance of the Act, he may recover it under any custom as if the Act had not been passed. The Act contains a general saving of customs (s. 60).<sup>\*</sup> See generally as to customs of the country, Woodfall, *Landlord*



and Tenant; Dixon, *Law of the Farm*; and the Parliamentary and other Reports referred to in these treatises.

**Customary Freeholds**—A species of copyholds, sometimes called privileged copyholds, which have this characteristic that although parcel of a manor and held according to the custom thereof, they are not expressed to be held at the will of the lord. At one time it was considered that persons holding according to this tenure were freeholders in every respect but this, that they were subject to the customs of the manor under which they held their freehold; but it has now been long settled that the freehold is in the lord, and that in the absence of custom (the onus of establishing which is on the tenant) the tenant has no right to work minerals (*Duke of Portland v. Hill*, 1866, L. R. 2 Eq. 765; Elton, *Law of Copyholds*, 2nd ed., pp. 2-6; Scriven, *Copyholds*, 7th ed., pp. 14 *et seq.*). They are to be distinguished from ancient freeholds of the manor where the freehold is in the tenant, and which are sometimes inaccurately spoken of as customary freeholds (Scriven, *Copyholds* (*supra*)).

**Customary Rights**.—An agreement for the lease of a farm contained, *inter alia*, this clause, "The landlord reserves to himself all customary rights and reservations, such as liberty to cut and plant timber, search for and work mines or minerals, etc., allowing the tenant for any reasonable damage that may accrue." In *Parker v. Taswell*, 1858, 2 De G. & J. 559, it was held by the Lord Chancellor that this stipulation was not void for uncertainty; that it was capable of being construed with reasonable certainty by reference to the custom of the country.

## Customs.

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The word "Customs," with reference to duties and charges on the importation and exportation of articles of commerce, is one of considerable antiquity.

The first consolidation of the customs *laws* (as distinct from rates and duties) was completed, after several years' labour, in 1823; prior to that there had been something like a thousand Acts in force. Between the first and fifty-third year of the reign of George III., thirteen hundred laws of customs were passed. The Acts of 1823 swept away all the Acts which had accumulated for five hundred and fifty years, viz. from the

year 1275 (3 Edw. 1.) to 1825. There have been several consolidations since.

*Scotland and Ireland.*—Up to the Union of Scotland with England in 1707, the revenues of the two kingdoms were distinct, and the customs duties more or less dissimilar; but upon that Union the duties in the former country were assimilated with those of England. At the Union of Ireland with Great Britain in 1801, certain “countervailing” or “Union” duties, imposed on goods passing between the countries, were granted until 1824. Ireland retained its own tariff up to that date, when the duties were assimilated to those of Great Britain, and the Union duties finally ceased. It was considered that the state of Ireland at the time of the Union rendered an interval of some years necessary before that part of the United Kingdom could be justly required to contribute to the common expenditure at the same rates, or by the same modes of taxation, as Great Britain.

At present, customs duties all over the United Kingdom are the same. There are no duties on exported goods now remaining, nor any bounties given to encourage exportation. The customs revenue is, at present, derived exclusively from duties on imported commodities.

It is almost needless to state that the chief port of the Customs system of the United Kingdom is London; and there is mention, so far back as A.D. 979, in the reign of King Ethelred, of tolls for various purposes being taken at Billyngesgate.

*Mode of Management.*—As regards the management of the customs, in early times they were farmed, or the right of levying them was let or sold, to some enterprising merchant, or some royal favourite, for a specified annual sum, and occasionally as recompense and in repayment of a loan to the sovereign in emergencies.

The pernicious practice of farming out the revenue could not, of course, last. As commerce increased, and the mercantile classes acquired strength and influence, the exactions and vexations of the “farmers” became more and more oppressive and intolerable; and towards the end of the seventeenth century, the customs were definitely taken out of farm and their collection transferred to a Board of Commissioners.

There are now three such commissioners (there being a power to the Crown to appoint five), with an advisory Legal Department.

To turn, now, to the existing position of customs laws and taxation; the present main charter of customs laws is the existing Customs Consolidation Act of 1876 (39 & 40 Vict. c. 36), preceded by the Tariff Act of the same session, c. 35. To these two Acts there have, in the intervening twenty years, been added numerous amendment Acts. It is now in contemplation to reconsolidate all these Acts.

As may naturally be supposed, these Acts point mainly to the security and collection of the revenue of customs; but there are various other matters falling to the daily work of the officers of customs, which these Acts cover. The officers of customs are, as they have been called in Parliament, the “police of the ports”; and it devolves on them to prevent the advent into the United Kingdom of anything which the law prohibits or allows only on certain conditions, and the departure of anything similarly placed under legal restriction.

*Revenue and Tariffs.*—Taking, however, the question first of the revenue, it is to be noticed that the large revenue above mentioned is raised now from a very few commodities, the free trade policy of the country having led to a reduction in the articles included in the tariff as liable to duty of,

in round figures, from twelve hundred to twelve, with the abolition of all *ad valorem* duties, and the difficulties surrounding that question.

The duties on articles remaining in the tariff are imposed solely for revenue (without any exception) in accordance with the entire principles of free trade. They are imposed either on articles which cannot, or are not allowed to, be produced in the United Kingdom, the duty on which cannot therefore have a protective tendency; or on articles which can be produced in the United Kingdom, for the purpose of countervailing a corresponding excise duty on similar goods there produced. Of the first character are wine, what are known generally as the "breakfast-table drinks,"—tea, coffee, and cocoa,—dried fruits, and tobacco, which is not allowed to be grown in the United Kingdom. Of the latter class are spirits, beer, and playing cards.

There are various other items enumerated in the tariff, but they merely find place there in respect to the fact that they contain spirit, and are taxed, upon a calculation of the most minute kind, for the spirit which they contain.

The last considerable reduction was made by the Budget Act of the year 1860, following upon the Anglo-French Treaty, when the articles enumerated were reduced from 428 to 142; and they have since been gradually diminished. Notable abolitions have been the sugar duties in 1874, and the plate duty in 1890. A copy of the present tariff is subjoined.

*Collection of Revenue.*—Such being the very reduced tariff of the United Kingdom, we pass to the question of how the laws stand which are enacted to secure and simplify the collection of the duties. This may be divided into two heads—(a) The prosecution and punishment of offenders against the revenue; (b) the warehousing system, whereby payment of duty may be suspended until need for actual use or consumption arrives; or, if it should be so, becomes ultimately non-payable, upon a decision to export the goods to a foreign destination.

(a) *Prevention and Punishment of Offences.*—As to (a) the prevention and punishment of offenders against the revenue, although, under the present very reduced tariff of this kingdom, smuggling offences have subsided into comparatively small dimensions, there is yet a considerable inducement to this illegal traffic, and it is still much more largely attempted than is generally supposed. The number of seizures of contraband goods amounts, roughly, to 6000 annually.

As has been shown, the dutiable articles which still remain in the tariff are few; and, as regards the majority in number of those which do remain, the duty is not large in comparison with the value of the article itself, so that illegal traffic in them is not worth the risk, and is seldom, if ever, attempted.

As regards two articles, however, the duty still retained is sufficiently high to tempt illicit trade; and, as to one of them, it is so high that such illicit action is almost invited; indeed, the duty on that article is now at a point beyond which it could not well go further without breach of one of the fundamental rules of import duty, that it must not be so high as to force smuggling on the public mind by the allurements of large profit.

The two articles in this category are spirits and tobacco; the former produces an average revenue of about four millions a year, the latter of about ten millions. On the former, the duty is beyond the average value of the goods; while, on the latter, the one most conducive to smuggling, the duty is, taking the various kinds all round, at the ratio of four times the value of the goods.

These high taxes, as may be seen at a glance, offer great inducements to breaches of the laws of customs revenue, and, no doubt, many acts of illicit trade in them pass, of necessity, undiscovered. But many, very many, are detected; and about fifteen hundred prosecutions in the year, with very few failures, mark the work and diligence of the Customs authorities in preventing and punishing offences under this head.

The powers of the Board of Customs to prevent and deal with these offences are, as indeed they are bound to be, very wide; and it may be interesting to state exactly what they are. They may be divided into three heads—(1) Precautionary powers; (2) Powers *in rem*; (3) Powers *in personam*.

(1) *Precautionary Powers*—*Right of Search*.—The chief precautionary power is the right of search. This right applies to all importing vessels of every kind, and a distinct statement of very old date in the statute book, and still repeated in the existing law, extends it even to vessels commissioned by Her Majesty, or by any foreign State.

It also applies, as a matter of course, to all imported goods of any size or description, and whether cargo, baggage, or stores; and also in order to guard against the relanding of dutiable goods exported from the warehouses, or upon drawback (to be hereafter explained), it extends to all exporting ships of commerce, and to all goods or packages of any kind shipped or brought for shipment at any place in the United Kingdom.

As a corollary to this right it is provided, and follows necessarily, that vessels liable to search, and endeavouring to evade that obligation, may be chased, and if not stopping to a signal gun, may be fired at or into.

The right of search also extends to persons on board of, or who may have landed from, any vessel or boat, subject to the provisions that the officer must be able, if necessary, to show good reason to suppose that the person he searches is carrying or has any uncustomed or prohibited goods about him; and that the person proposed to be searched may, if he prefers it, demand to be taken, with all reasonable despatch, before a justice, or before a collector or other superior officer of customs, who shall decide whether there is reasonable ground for search or not.

As to premises and things inland, houses are liable to search; but they cannot, like vessels, be entered by officers of customs merely by virtue of uniform. In order to enter and search a house, an officer must be armed with a warrant from a justice of the peace, or with a document emanating from the High Court of Justice, and issuable by the commissioners, or collector, or chief officer of customs, and called a "writ of assistance." Armed with such authority, an officer may enter a house in the daytime, and when there may break open doors, chests, trunks, and packages. Carts, waggon, and other conveyances may be stopped and examined anywhere upon reasonable suspicion or probable cause.

*Limitation of Size of Packages and of Vessels*.—After the right of search, an important factor in preventing smuggling is the limitation of the size of vessels which may be used in carrying dutiable goods, of the packages in which highly dutiable goods may be imported and exported, and also as to small vessels generally, the uses to which they may be put.

The Commissioners of Customs have power, as to all vessels not exceeding 100 tons burden, to make orders prescribing the limits within which the same may be employed, the mode of navigation, and the like; if armed, the nature of the armament, and, generally, such terms, particulars, and restrictions as the commissioners may think fit. In addition, it is prescribed by statute that no ship of less than 40 tons burden shall import

spirits (except perfumes and such like), nor any ship of less than 120 tons, tobacco; and no dutiable goods at all are to be exported from warehouse, or upon drawback, in any ship of less than 40 tons.

No foreign spirits (except as aforesaid) may be imported in casks or other vessels of less content than nine gallons; nor in bottles, glass, or stone, unless properly packed in cases as cargo. No tobacco, including in that term cigars, cigarettes, and snuff, may be imported, unless in whole and complete packages of not less than 80 lbs. gross weight. Any spirits or tobacco imported contrary to the above, even to the smallest quantity for personal use, are, in strictness, illegal; and, where allowed, in personal baggage, or for trade samples, it is merely an *ex gratia* permission, to suit public convenience.

*And as to Places of Landing.*—No goods of any kind may be landed (and if for that purpose they are waterborne in lighters it must be under bond), except at specified places, in prescribed hours, and under official supervision; and export goods, especially those from warehouse, or upon drawback, must be laden also with similar limitation as to place, time, and supervision. Places for landing and lading goods are either sufferance wharves, or quays or docks, authorised by the commissioners, and under bond; or places specially appointed under Treasury warrant, and exempt from bond, called "legal quays," or places authorised by Act of Parliament, or by reason of special security of surroundings, or resting on prescriptive right.

(2) *Powers in rem.*—The powers of the Board of Customs, *in rem*, are of a drastic nature, and although it would be very difficult to guard the revenue without them, they could only be properly wielded with great moderation and forbearance.

It goes almost without saying that all prohibited goods—all dutiable goods passed into use without being "customed," as the phrase is, or in other words, without duty paid—and all goods to which restrictions on importation apply, imported in disregard thereof, are liable to seizure, and in due course to forfeiture to the Crown.

But the power of forfeiture goes beyond the goods themselves; it goes to—

- (a) The packages in which the same are found and to all the contents thereof; so that, in point of strict law, for instance, a handsomely mounted dressing bag may be forfeited absolutely for a handful of cigars concealed and discovered in it;
- (b) To all carts, boats, and other conveyances used in any way in landing or conveying the forfeitable goods;

And lastly, and most especially—

- (c) To the importing ship itself, as to which the law is as follows:

If British, within three leagues, or if not British, within one league, liable as follows:

A ship of any size if constructed, or having structural provision, for smuggling.

A ship, under 250 tons burden, with or having had on board the highly dutiable articles, spirits or tobacco, in illegal sized packages.

Ships of 250 tons burden and upwards offending as to the highly dutiable articles may be fined by the Commissioners of Customs to the extent of £50 under special provisions, or in exceptional cases to the extent of £500 by a Court.

*As to Seizure and Forfeiture.*—The power of seizure and forfeiture is made an easy weapon in the hands of the Board of Customs by the fact that, under laws of long standing, the initiative of bringing the question of the legality of seizure, in any case, under the purview of a Court, rests not with the Crown, but with the owning subject.

If the seizure is not made in the presence of the offender, the seizing officer must give notice in writing of it to the owner or master; but subject thereto, the work of the Crown ceases upon the seizure itself, and the forfeiture becomes, *ipso facto*, absolute, unless the owner or master gives, within one calendar month, notice in writing that he disputes the legality of the act. If such last-mentioned notice is given, the Crown has to bring the case into Court—either magisterial or High Court of Justice—and apply for an order confirming its action: but such resistance is very rare, and, practically, the act of seizure is regarded and operates as a decision of condemnation.

While, however, these powers may appear to be very stringent, it may be stated that the Board have statutory authority to deal with any seizure which their officers may make, in the amplest manner as to restoration, release, or partial condemnation, by acceptance of a modified payment. And, as a matter of fact, the forfeiture of anything but the actually offending goods themselves is a power most cautiously exercised. It is so especially as to ships; rarely, if ever, is a ship entirely forfeited, unless it is one which habitually offends; or unless it is a case where a responsible officer of the vessel is the individual chiefly to blame, no punishment is inflicted on the ship at all. Where punishment is inflicted, it seldom goes beyond a fine proportioned to the value of the ship; and in almost every case her freedom for commercial use is permitted without delay, by acceptance of a reasonable deposit in money to await the Board's decision.

(3) *Powers in personam.*—The powers of the Board *in personam*, or against persons who have actually committed offences against the revenue of customs, follow consistently the powers of seizure. This division of the subject may be conveniently taken under two heads—(a) The persons liable; (b) The amount of punishment and modes of procedure.

*Persons Liable.*—As to (a), all persons are liable who import or bring, or unship, or deliver from a quay or warehouse, or harbour, keep, or conceal, any prohibited, or restricted, or uncustomed goods contrary to the laws, or who aid in so doing; and the words of the Act, besides specifying these offences, go further, and make liable every person who deals with goods in any way with intent to defraud Her Majesty of any duties thereon, or who is knowingly concerned in any fraudulent evasion of duties of customs, or in any way acts contrary to the customs laws; and persons detected in any such offences may be “detained” or arrested without a warrant. Masters of vessels and other persons are, moreover, liable who neglect customs requirements of a documentary character, whether for revenue or statistical purposes. Masters also are liable who do not “bring to” at the proper stations, or who do not properly accommodate the revenue officers; and so also is any person on board a vessel or landing from it, who opposes or obstructs an officer in the execution of his duty, or rescues or attempts to rescue goods or persons. The assembly of three or more persons for the purpose of illegal unshipment, or the procuring such assembly, or being armed or disguised for smuggling purposes, remain as offences still specified for heavy pecuniary punishment, and, as to some of them, for sentences of imprisonment.

There is one other class of offenders who must be specially mentioned, as the power to deal with them constitutes an exceptional weapon in the hands of the Commissioners of Customs. It is a provision of long standing, and has recently been the subject of statutory modification. Given a ship liable to seizure, that is to say for smuggling construction, or because of illicit carrying of spirits or tobacco unowned, and "every person who shall be found or discovered to have been on board" that ship, whether of the crew or the passengers, is liable to arrest, and upon simple proof of having been so found or discovered, to conviction in a penalty named at £100. This at first reads as a very arbitrary power, and as implying, contrary to the spirit of English law, a possibility of punishment without proof of criminal knowledge, and as involving an innocent public in liabilities of which they move about in perfect ignorance.

The power is rarely exercised, in less indeed than 2 per cent. of the customs prosecutions; and it has been recently modified by 50 & 51 of the Queen, c. 7 (the Customs Amendment Act, 1887), which has enacted "that no person shall be liable on conviction" under the section relating to this matter, "unless there shall be reasonable cause to believe that such person was concerned in, or privy to, the illegal act or thing proved to have been committed."

*Punishment and Procedure.*—With regard to heading (b), customs offences stand in an ambiguous position. The punishment for them was originally a penal debt to the Crown, followed, as debts then were, by imprisonment until payment or pardon; and the procedure was by quasi-civil action in the Court of Exchequer—a process of a somewhat peculiar character which still continues, and is occasionally used, as will be presently mentioned.

*Magisterial.*—The inconvenience of this process, however, for small and oft-recurring offences, and the general leaning towards the extension of magisterial jurisdiction, led to statutory provisions in the years 1853 and 1876, enabling justices in petty sessions to deal with offences against the laws of the customs, in accordance with a process, formalities, and powers of punishment prescribed in those laws. In cases of petty smuggling, the magistrate had power to inflict the prescribed penalty, and if it was not paid, to adjudge a short term of imprisonment; but, in all cases of any magnitude as to spirits and tobacco, the case was remanded for the opinion of the Commissioners of Customs as to what penalty, whether treble duty-paid value of the goods, or £100, should be sued for; and when this was decided according to the character of the offence, the magistrate had no power (except in special circumstances) to pronounce a term of imprisonment, but only to adjudge payment of the penalty, and in default thereof, imprisonment until payment or pardon, the duration of such imprisonment resting (subject to some statutory limit) with the Board of Customs, under control of the Treasury.

With the exception of points, mainly formalities, there was no great difference between the process under the magisterial law as contained in the Customs Act, and that in the ordinary law of summary procedure; but, when in the years 1879 and 1881 Acts were passing amending the general summary procedure of England and Scotland, especially as to pecuniary and other punishments, it was thought desirable to bring revenue cases within the general law of such procedure.

This was effected by the Summary Jurisdiction (England) Act, 1879, and the Summary Jurisdiction (Scotland) Act, 1881; and by these Acts there was conferred upon the magistrate the power, in all cases of first

offences, to mitigate the penalty to any extent, and, subject to fixed limits, to adjudge in all cases the precise sentence in default of payment.

*Infliction of Sentences.*—The infliction of sentence by the magistrates, however desirable it may be on various grounds, has led to one disadvantage which was previously avoided. Under the old system the sentences throughout the kingdom, being adjusted by a central Board, were, so far as any system can be, uniform and commensurate. They now vary, of course, according to the views on such offences of the different benches or presiding magistrates; but some central uniformity is still aimed at by all cases of more than a month's sentence being reported to the Treasury for consideration as to whether or not, in comparison with a general standard, the sentences should be, to any extent, remitted or not. In cases of ordinary offences, the sentence which a magistrate may inflict is limited to three months; but by special provision it is, in revenue cases, and where the penalty exceeds £50, extended to six months.

The Commissioners of Customs, however, have felt, and, at the passing of the last Summary Procedure Acts, urged that this length of imprisonment would be quite inadequate in cases where, as not infrequently happens, the penalties for customs offences run, by being treble value, to several thousands of pounds. To wipe off such a sum by six months' imprisonment without hard labour (which can only be inflicted for second offences, and is rarely, if ever, pressed) would be a very easy escape; and consequently, as above stated, the Exchequer process still remains for all these large cases, and is not infrequently used.

*Exchequer Procedure in High Court.*—It is a very old procedure, modified by recent rules, but with a process still peculiarly its own. The offender is arrested under a writ of *capias*, granted by a judge in chambers on evidence produced before him in the form of affidavits; and being arrested, the prisoner has to give bail (fixed by the judge) to appear and meet the accusation, or he must remain in prison until the hearing. At the hearing he is treated as a civil defendant rather than a prisoner, and is competent, and, indeed, compellable to give evidence; but if the verdict is against him, he is adjudged to pay the penalty, or to go to prison until payment, or during the Crown's pleasure.

Several cases of smuggling of considerable magnitude have, in the last few years, been dealt with under this process, the penalties running to £1943, £3373, £1792, £6000, and the like; and it is a process which is most effectual in breaking up smuggling companies or gangs, and bringing home punishment to the main offender in nearly all such cases, namely, the dealer or receiver.

*Onus probandi, etc.*—Another important position of the peculiar Customs system is that which, in the case of any prosecution for goods seized, throws on the defendant the burden of proof that duty has been paid. This is still retained, and is absolutely essential, as it would be almost impossible for the Crown to prove the negative position; while the fact that duty has been paid can be easily proved, and the suspicions attaching to the goods explained, by any defendant whose transactions have been perfectly legal and above board.

The exact locality where a breach of the customs laws is committed is not so important a point as in the case of most other offences, for an offender in any county, or in the waters of any county, may be brought by the Board, if they think fit, before a bench of any other county or place.

Penalties and forfeitures paid into Court, or after imprisonment, are remitted in full to the Board; and all Court fees and costs properly attaching,



are, subsequently, after due audit, paid back by the Accountant-General of Customs.

*Rewards and Bribes.*—The Board have large discretionary powers, controlled to some extent by Treasury rules, of rewarding officers and others who assist in the detection and punishment of customs offences; the value of the goods seized, irrespective of whether they are ultimately sold or not, and the amount of the pecuniary penalty recovered, form the basis for estimating rewards out of the money voted by Parliament for that purpose. Recipients of the bounty may be, either the person or persons seizing, the person giving information, the officer or any other person arresting an offender who becomes convicted, or, generally, any person by whose means a seizure is made, a penalty recovered, or a conviction obtained.

The law (sec. 217 of the Customs Consolidation Act, 1876) is exceedingly strict as to the purity of the customs service. Not only is an officer liable to a severe penalty—£500—and instant dismissal if he takes a bribe, but every person who shall give or offer, or promise to give, or procure to be given, any bribe, recompense, or reward to, or shall make any collusive agreement with, any such officer or person as aforesaid to induce him in any way to neglect his duty, or to conceal or connive at any act whereby any of the provisions of any Act of Parliament relating to the customs may be evaded, shall forfeit the sum of £200.

The penalties for customs offences vary a good deal, depending on whether the illegality leads directly to risk to the revenue, or only indirectly so by the neglect of some formality.

(b) *Drawbacks and Warehousing.*—It naturally, as commerce extended, became an incident to the imposition of import duties to provide for freedom, in effect, from those duties of goods which, although imported, and so liable *prima facie*, might not, in the issue, go into consumption or use in the country imposing the duties, but after resting a time in that country might, in the demands of trade, be re-exported elsewhere; and this was a point more peculiarly essential as regards England, which for centuries, more or less, and now most markedly before all the rest of the world, has assumed and acquired the position of the great *dépôt* for the world's goods, whence they are circulated to the rest of the civilised communities.

This need was, for a long time, met by the repayment of the whole, or, according to circumstances, an estimated portion of the duties, upon proof of identity and re-exportation; and the duty thus paid came to be known by the technical term of "drawback," and the repayment was called an "allowance of drawback."

The older lengthy tariffs were all rendered more lengthy by a statement (following the declaration of duty) of the amount of drawback which would be allowed on each article, on proof of re-exportation.

This, as must be obvious, was not an easy machinery to work, and opened the door to a good deal of fraud. Moreover, it fell short of what was entirely desired, inasmuch as it still left on the mercantile world the burden, pending the decision as to where the goods would go to ultimately, of an advance and lock-up of the duty, with consequential loss of interest in the meanwhile.

To meet this burden there has grown up, by degrees, the large system of "warehousing" as it is called, or of allowing importers to place their goods, on importation, in premises where they are secured, and under Crown supervision, and as regards which goods the payment of duty—although it becomes a debt to the Crown immediately on importation—is suspended until either the goods go into home consumption, and the duty is paid, or the

debt ceases to be a debt by the fact of re-exportation. The importer also gains this advantage that, in case of articles liable to natural waste, or deterioration from leakage, or evaporation, such as wine, spirits, or tobacco, he is only called upon to pay the duty upon the quantity, or weight, remaining at the time of delivery for consumption.

The places of security which are authorised for this purpose are, all of them, under Crown supervision at all times; and, as a rule (though this is not an essential obligation on the part of the Crown), under Crown lock. Some of them, as, for instance, the great docks, are authorised for this purpose by Act of Parliament, and have obligations statutorily imposed on them as to surrounding walls, gates, etc., and with no further personal security; but the majority are buildings approved, from time to time, and at request, by the Board of Customs, according to the trade and requirements of each locality; and the duties on the goods deposited in them are secured by a bond to Her Majesty given by the warehousekeeper (or wharfinger as he is often called) and two sureties, the amount of the bond and the sufficiency of the sureties proposed being in each case a matter for the discretion and decision of the Board, or, if appeal is made to them, of the Treasury.

The greatest care is taken as to the nature, position, and mode of construction of these buildings: and when they are once approved, no alteration of the smallest kind is allowed in them without the Board's consent, since any alteration of a material character might, as against the sureties, imperil the Crown's security under the bond.

The Board of Customs may (subject to some reservations) at any time revoke an approval of a warehouse, and require that no more deposits shall be made in it, and that the existing deposits be cleared.

It is this system which has attained to an enormous magnitude, requiring most careful working, and a large staff of supervision, which has led to the terms "bonded goods," "sales in bond," and the like.

The introduction did not at once, but it has ultimately rendered unnecessary the older and defective plan of "drawback"; and, with one exception, that repayment is only applied now to cases where raw material imported into the United Kingdom is worked up in the manufacturer's own premises, and exported in the finished state; as, for instance, tobacco leaf converted into manufactured tobacco, or coffee berry rendered fit for use by roasting and so forth: the manufacturer has employed labour of the United Kingdom, and obtains a return of the duty paid on the raw material.

*Establishment of Warehousing.*—The principle of postponement of duty existed to some extent before the warehousing system by a provision which was enacted, that as regards certain articles, and upon payment down of part of the duties, security might be given by bond for the payment of the remainder at certain periods of time. For linens and silks this was allowed for twelve months; for wines, nine months, and so forth; and a discount was allowed for more prompt payment, and this concession was largely made use of; but was, of course, displaced by the warehousing system.

As regards that system, it is a matter of history, but it may, perhaps, be incidentally stated, that its adoption—of such great advantage to the commerce and industry of the country—was, at first, stoutly resisted, and nearly caused a rebellion. In his great Excise scheme in 1753, Sir Robert Walpole proposed warehousing as a matter of obligation on importers of tobacco and wine; but the thing was regarded with so much suspicion, that not only was the safety of the minister's person for a time in peril, but, despite its obvious advantages, the proposal had to be withdrawn. The opponents, besides simply political enemies, were those monopolists who made fortunes by

defrauding the revenue in their claims for drawback; and they induced the people to believe that the plan was merely the insidious commencement of a universal system of revenue espionage.

A scheme, therefore, which—besides meeting the axiom that every tax ought to be levied at the time, and in the manner most convenient for the payment of it—obviated forced sales, broke down monopolies, and augmented the carrying trade of the country, was postponed for fifty years. In 1803 it was introduced as a general system on a voluntary basis by the Act 43 Geo. III. c. 132.

Goods in warehouse leave it in either one of three ways; either directly into the country for home consumption, or directly for exportation from the same port, or, by what is technically, and, indeed, naturally, called “removal” from the port of warehousing, under bond covering the risk of such removal, to another port for rewarehousing there, or, it may be—and this is permitted—for direct exportation from such port of arrival.

“Warehouses” are, in their design, places of deposit only and not of manufacture; but some “operations” for the preservation, or the perfecting, by slight manipulation, of goods are allowed in bond, partly by statutory provision, and partly at the discretion of the Board of Customs and the Treasury, the point in view being always not to enlarge the deposit into manufacture in competition with inland trade.

This is the general character of the warehousing system; but there is one special kind of warehousing which obtains that is distinctly one of manufacture, namely, a manufacture—under the Tobacco Act 26 & 27 Vict. c. 7—of special kinds of tobacco.

*Special Tobacco Warehouses—Cavendish, etc.*—The history of this is as follows:—Tobacco is not allowed to be manufactured in the United Kingdom from the leaf, except from pure tobacco, and, with slight exception as to a little flavouring oil, from nothing else; and the tobacco factories are under supervision to see that this is carried out. This is not done from reasons of purity (although that is often imagined to be the case, and is, more or less, thought of), but from fiscal reasons, because as the duty is paid on the leaf taken from bond for manufacture, any addition would, in the consumption, escape duty. On imported unmanufactured tobacco this is not essential, because there any ingredient added would be weighed in and pay duty.

When in 1863 the tobacco duties were reduced so as to make the duty on foreign manufacture no longer a prohibition as it mainly, in effect, was before, it was pointed out that, whether by smuggling or by high duty paid, two kinds of foreign manufactured tobacco had obtained access to the country, and that the special point in regard to them was the addition to them of sweetening matter; and it was urged that, if by reduction of duty, these two kinds of tobacco were to be thenceforth admitted with comparative ease, some facility should be given to the home manufacturers to produce them also. The two kinds of tobacco were those known as “cavendish” and “negrohead,” which mean respectively sweetened tobacco put into “cake” or “roll” shape.

It was obvious that the only way of meeting this demand was to allow, in the United Kingdom, similar manufacture in *bond*, so as to assess the duty, not on the leaf used, but on the manufactured result after the sweetening addition. It was accordingly provided by the Tobacco Act of 1863 that such manufacture might take place in bond, and, as a necessary revenue consequence, that all tobacco so manufactured should be earmarked by being enclosed in a Government wrapper and stamp. This was,

of course, necessary in order to enable the Government officers to detect tobacco not so legitimately produced; and as a further consequence, all imported cavendish and negrohead tobacco had to be similarly wrapped and marked in order to preserve it from seizure on suspicion of being illegal home manufacture.

This led both to the wrapping of cavendish and to the inland establishment of warehouses for its manufacture. There are only a few of such warehouses; but any statement of the Government warehousing system would be incomplete without a mention of them.

In ordinary tobacco factories in the country a tobacco in cake is manufactured and often called "cavendish" without wrapper, but this is unsweetened, and the name is really a misnomer.

Goods in bond pass freely while there from owner to owner, and are sold over and over again, though still stationary and under supervision. This is effected by the document called a "dock warrant" (*q.v.*) passing between seller and buyer, which has become, in commerce, a well-known negotiable instrument. The customs, however, pay no attention to these warrants, or to the transfers effected by them; they look for the duty, without regard to ownership at the time of clearance, to the bond originally covering the duty.

When goods are delivered from the warehouse for home consumption, for every £100 of duties of customs payable thereon warehousing rates are charged upon them in addition to the duties—

In respect of tobacco . . . . .	£0 2 6
In respect of other goods . . . . .	0 5 0

*Reports, Entries, Clearance, etc.*—All goods passing under the supervision of the customs officers have—as may naturally be supposed—to be subjected to a certain amount of documentary papers tendered at the various custom houses; these documents being necessary not only for the purpose of securing the revenue, but for the further purpose, of very great importance, of ascertaining the statistics of all the import and export trade of the country. These statistics are collected in an official branch at the central custom house, and are transmitted thence for the periodical publications of the Board of Trade.

*Customs Documents.*—The principle of these documents is that every ship on arrival has, within twenty-four hours, to be "reported" by its master, with a general statement of the cargo on board, and within a certain time, every parcel of goods on board has to be "entered" by the respective consignees or their agents. The statement on behalf of the ship, and the statements on behalf of the consignees are, in due course of time, collated, or in the technical term "jerqued" by special officers for that purpose at the custom houses, until complete accuracy as to the reported cargo is obtained.

Goods to be warehoused have to be specially "entered" for that purpose; and when they are delivered, subsequently, for home consumption, or for exportation or removal, documents constituting a delivery warrant or authority have to be passed.

With regard to goods exported, as no duty is payable, the same complete accuracy is not necessary. Of course, as regards all free goods, no question of duty at all is involved; and as regards goods which, if imported, would be dutiable, and which come from the warehouse, or receive drawback, there is the question only that they certainly leave the country, and are not either surreptitiously diverted on shore before shipment, or if shipped, not illegally "run" back again. With respect to such goods there

are special documents, supported by bonds, to secure certainty, both of shipment and of delivery at the place of destination. With reference to the free goods, the only care of the Government is to get a reasonably accurate statement of them for statistical purposes; and as regards them, all that is required is that the exporter of each parcel shall, within six days after the final clearance of the ship, deliver—under a penalty of £5 if he fails to do so—a specification of such goods, and of their value; and these are also checked or “jerqued” with the general statement or manifest of his cargo which the master of the departing ship has to render before her final clearance or permission to sail. The fact that a ship has been duly “cleared” is proved by certain documents signed by the proper officer of customs and borne on board.

*Coasting Trade.*—Besides the supervision of vessels departing to and arriving from foreign ports, the Commissioners of Customs have also in charge all traffic by coast from one part of the United Kingdom to another, that is to say, from any port of Great Britain and Ireland to any other port, and to and from the Isle of Man, which, for customs purposes, is part of the United Kingdom. See COASTER.

*Fishing Boats.*—There is one kind of boats, which in this matter stand in a somewhat ambiguous position, namely, fishing boats; they do not go on what is called a foreign voyage, strictly speaking, as they do, not go to “parts beyond the seas”; while, at the same time, they can scarcely be said to do coasting trade, as they go to stations beyond the territorial waters. They stand therefore in the position, that being registered for their special calling they are, so far as such registration goes, allowed to follow that calling, and that only. They may carry along the coast the various goods which are allowed to be taken without a transire, and they may similarly carry their own catches of fish and any appliances connected with their trade; but they are essentially fishing boats, and that only; if they are required to be used for ordinary coasting traffic or for a foreign voyage, and are of a size within the registration requirements of the Merchant Shipping Act, as they would mostly be, they must be registered also as ordinary British ships under that Act, and, until then, can receive neither transire nor clearance.

*Meaning of the Word “Stores.”*—Some mention must be made of the position of what are known as stores. The word “stores” is a term which has a large technical meaning in customs phraseology. It relates to vessels going to or coming from a foreign voyage, and means certain dutiable articles for consumption on board such vessels. It has during most of this century been the policy to permit the storing, free of duty, of articles, otherwise dutiable, on board vessels going to foreign parts, and to give certain facilities for similar consumption, in British waters, of stores on vessels arriving from parts beyond the seas. This is a just and valuable privilege conceded to the great national industry, so as to place it at no disadvantage with foreign ships; and is of necessity conceded also to foreign ships coming to our waters; but it requires and gives occasion for great care in administration.

*As to Vessels Sailing for Foreign Parts.*—With regard to vessels sailing for foreign parts; such vessels, if of the burden of 40 tons or upwards, are entitled to take on board from bond, upon due request and authority, and upon such terms and conditions as the Commissioners of Customs may direct, such stores, as, with reference to the number of the crew and passengers on board and the probable duration of the voyage, may be allowed by the collector, acting under instructions laid down by the Board.

The articles so shipped are particularly specified on papers to be furnished by the master, and must be covered either by a bond given by him or, in some special cases, by the storedealer, such bond undertaking that the goods shall be duly shipped, carried clear of the territorial waters, and in due course consumed on board. This, as a general rule, is a fairly simple process. Greater difficulty arises in dealing with surplus stores on vessels arriving from foreign parts.

*Surplus Stores on Vessels from Foreign Parts.*—In the first place, all such stores have to be faithfully stated by the master in his "report" of the ship, and the truth of his statement is, of course, tested by the examination made by the customs officers of everything on board. Subject to a certain allowance—to be maintained—all such stores are, while the vessel is in British waters, locked up and sealed on board, or, if a further foreign voyage is not soon contemplated, are removed to a Queen's warehouse, and kept in charge until required by the owners for further use; or, if the amount is not sufficiently excessive to give rise to any suspicion as to intended evil practice, they may, upon payment of duty, be admitted to home consumption, notwithstanding that, as regards size of package, they are not within the usual law.

The breaking of locks or seals placed on stores on board any vessel, whether committed in the port where the seal is affixed or in any other port, or in any intermediate waters, is a serious offence, for which the law provides a penalty, and, by a necessary and wise provision, throws the responsibility for any such an act mainly on the master—proof of the act done is alone sufficient—for his crew the master is properly, on this point, so open to information, made primarily responsible. There is, however, as indicated above, a generous allowance in respect of stores, made as to vessels resting solely in British waters. If within reasonable time (as a rule estimated at one month) vessels are intending to sail again, a certain amount of stores calculated as sufficient for those on board for the given time, is left out by the officers, and the allowance may, if circumstances justify it, be renewed from time to time.

*As to Vessels port "Foreign" and part "Coasting."*—The above remarks deal only with vessels either sailing directly to or arriving directly from, and returning directly, or with only necessary delay, to foreign parts. A different question arises as to vessels which may commence their journey abroad by some coasting traffic in British waters, or, having arrived from abroad at one port, may be destined to go to one or to several others. The difficulty arises here, because while this concession of stores is allowed to vessels to and from parts beyond the seas, it is not allowed to coasting traffic. Vessels engaged in *such* traffic are held to be in the United Kingdom from the commencement to the end of their voyage, and persons on board vessels so engaged are no more entitled to the free consumption of goods than persons on the actual land.

The completion of a voyage from foreign to its last port of destination in the United Kingdom, or the commencement of a foreign voyage by calls at several home ports, is a kind of traffic which is not exactly coasting, nor is it foreign voyaging. It is so far coasting that it is confined to the territorial waters, or nearly so, and that (subject to certain regulations and safeguards for separation and the like) vessels on these kinds of voyages are allowed to carry coastwise goods, as above mentioned.

It has, however, been long held, first as to foreign vessels, and ultimately as to British vessels, that these beginnings and ends of foreign voyages, provided they genuinely are such, shall, for the purposes of stores,

be considered part of the foreign voyage, and stores be allowed accordingly. The arrangement, however, has to be carried out with careful provision against abuse; estimated quantities for use while the vessel lies in the first port are allowed out there only; and when the vessel leaves that port a further estimated quantity to last until arrival at the second port, and so on. The officer at the first port sends notice to the proper authority at the port of intended arrival of exactly what stores he left out and what he left under seal when the ship sailed, and any departure from this arrangement or apparent tampering with the reserved portion is closely inquired into.

*As to Yachts.*—Stores free of duty are allowed to yachts; and as it is difficult with vessels of that character to fix them to any special foreign voyage, stores are of necessity allowed them somewhat freely, provided they are not consumed while merely cruising about the coasts.

*As to Fishing Boats.*—Stores, according to the strict provision of the law, are only allowed to vessels going to "parts beyond the seas." The question whether they should be allowed to fishing boats which, though not going to or touching at any ports beyond the seas, go into, and on, the seas for long periods at a time, is somewhat an open one. They are, however, allowed to whale fishing vessels, and a recent order has made arrangements for sale by mission ships of duty-free tobacco to the North Sea fishing fleets.

*Work outside Revenue—Neutrality.*—As previously stated, the work of the officers of customs, as "police of the ports," consists of much more than merely securing the revenue. Apart from their great aid to honest commerce in securing the truthful marking of goods under the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), which is dealt with under another heading (MERCHANDISE MARKS), they have to inhibit the advent into the United Kingdom of everything which is prohibited to enter it, and the departure of everything which ought not to leave it. The latter point—preventing departure—does not often arise. It arises only under two circumstances; one, that of two sovereign States friendly to Her Majesty being at war. Then the obligations of Her Majesty in respect of neutrality impose on the customs, acting as far as possible under the Foreign Office, the duty of preventing any ship from leaving the waters of the United Kingdom, which may be built or equipped in any way contrary to the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), and detaining such ship, in accordance with the law of that Act. Fortunately this duty does not often occur; but, when it does occur, as, for instance, in the recent war between China and Japan, it imposes most anxious and onerous work on the officers of customs and those who have to instruct them.

*War Precautions.*—The other point in preventing departure arises only if Her Majesty, under powers conferred by the Customs Acts, prohibits the departure of arms, ammunition, gunpowder, or any article which that section covers. This, however, is a power given to the supreme executive, which is seldom exercised. It is meant for use, not, as in the case last referred to, of securing Her Majesty's neutrality, but of protecting the defensive position of the country, if war is at all threatening. It was last used in the Russo-Turkish War in 1878. Of course, whenever it is put in force, it requires great vigilance to carry it out. It was used also during the Crimean War; but, in order to diminish as far as possible the inconvenience to traders thus caused, permission was granted to merchants to export the prohibited articles to particular quarters of the world, remote from the seat of war, on special bonds, technically called "war bonds," subject to proof of the actual landing of the goods at the stated destination.

*Prohibition on Importation, Copyright, etc.*—The inhibition by officers of customs of departing goods or ships is thus, while most important, when it does arise, a duty seldom and only exceptionally called for. But their duty to prevent importation, even apart from true marking, is a constant one, requiring daily care. It extends to the following matters:—First, under the Customs Act itself, and for the good of the community at large, to false coins, and to indecencies of any kind; and, for the protection of private interests, to piratical reproductions of “books” (which word includes pamphlets, sheets of letterpress or music, map, chart, or plan), provided the copyright owner complies with the Act and regulations as to duly notifying the Board of his ownership. This copyright protection extends also to “books” which, although the subject, primarily, of foreign copyright, may, under the International Copyright Acts, have rights of copyright in the United Kingdom; and the protection thus secured by notice gives protection also (by intimation from the Board to those dependencies) in the colonies, and all parts of the British Empire. In most dependencies, however, admission (and this is provided for by joint action of the Customs and Copyright Acts) is allowed to such works as a convenience for the reading “audience” upon a small licence tax collected by the dependency, and remitted to the Treasury at home, for distribution to the copyright owners registered with the Board of Customs.

*Explosives.*—Secondly, under other Acts, linked expressly with the Customs Act, the following matters are under prohibition, namely, all explosives imported contrary to the laws as to the importation and carriage of such dangerous materials; and all cattle or animals imported contrary to the regulations of the Home Office, under the Contagious Diseases (Animals) Acts for the prevention of cattle disease.

*Public Health.*—The general health of the community is also, primarily, in the hands of the officers of customs, for the first questions as to the health of every ship arriving in the waters of the United Kingdom, before being, if necessary, handed over to the local sanitary authority, are put by the customs officers.

*Islands.*—The Isle of Man is part of the United Kingdom for the purpose of the customs laws, and the import revenue there is received by the commissioners. The Channel Islands (though generally included in the statutory expression “British Islands”) are not part of the United Kingdom for customs purposes, nor is any import revenue received there; but the commissioners have jurisdiction over the islands so far as to have officers there, and to superintend exportation therefrom, so as to prevent the islands being made depôts for smuggling by illegal importations into the United Kingdom.

# SCHEDULE.

## TABLE OF DUTIES AND DRAWBACKS.

	£	s.	d.
Beer, viz. :—			
For every thirty-six gallons of beer of the descriptions called mum, spruce, black beer, or Berlin white beer, and other preparations, whether fermented or not fermented, of a de- scription similar to any of the preceding—			
Where the worts thereof are or were before fermentation of a specific gravity—			
Not exceeding one thousand two hundred and fifteen degrees	1	8	0
Exceeding one thousand two hundred and fifteen degrees	1	12	10



# CUSTOMS

	£	s.	d.
For every thirty-six gallons of beer of any other description—			
Where the worts thereof were before fermentation of a specific gravity of one thousand and fifty-five degrees	0	7	0
And so on in proportion for any difference in gravity.			
On all such last-mentioned beer imported into Great Britain or Ireland, and subsequently exported as merchandise, or for use as ships' stores, or removal to the Isle of Man, there is allowed drawback under special provisions for that purpose.			
Cards, playing, per dozen packs	0	3	9
Chicory—			
Raw or kiln-dried the cwt.	0	13	3
Roasted or ground the lb.	0	0	2
Chloroform the lb.	0	3	1
Chloral hydrate the lb.	0	1	3
Cocoa the lb.	0	0	1
Husks and shells the cwt.	0	2	0
Cocoa or chocolate, ground, prepared, or in any way manufactured the lb.	0	0	2
Cocoa butter the lb.	0	0	1
Coffee the cwt.	0	14	0
Kiln-dried, roasted or ground the lb.	0	0	2
There is allowed on all coffee roasted in Great Britain or Ireland, and exported as ships' stores, a drawback equal in amount to the import duty on raw coffee.			
Collodion the gallon	1	5	0
Currants the cwt.	0	2	0
Ether, acetic the lb.	0	1	10
Ether, butyric the gallon	0	15	8
Ether, sulphuric the gallon	1	6	2
Ethyl, iodide of the gallon	0	13	7
Figs the cwt.	0	7	0
Fig cake the cwt.	0	7	0
Plums, commonly called French plums and prunelloes the cwt.	0	7	0
Dried or preserved (except in sugar) not otherwise described the cwt.	0	7	0
Prunes the cwt.	0	7	0
Raisins the cwt.	0	7	0
Spirits, viz. :—			
For every gallon computed at proof of spirits of any description (except perfumed spirits), including naphtha or methylic alcohol purified so as to be potable, and also mixtures and preparations containing spirits	0	10	4
Additional	0	0	6
For every gallon of perfumed spirits	0	16	6
Additional	0	0	9
Where a person importing liqueurs, cordials, or other mixtures or preparations containing spirits in bottle may have entered the same in such a manner as to indicate that the strength is not to be tested, duty is charged and paid at the rate following, viz. :—			
For every gallon thereof	0	14	0
Additional	0	0	8
Tea, until the first day of August 1897 (annually enacted) the lb.	0	0	4
Tobacco, viz. :—			
Tobacco manufactured—			
Cigars the lb.	0	5	0
Cavendish or negrohead the lb.	0	4	6
Cavendish or negrohead manufactured in bond the lb.	0	4	0
Other manufactured tobacco the lb.	0	4	0
Snuff containing more than 13 lbs. of moisture in every 100 lbs. weight thereof the lb.	0	3	9
Snuff not containing more than 13 lbs. of moisture in every 100 lbs. weight thereof the lb.	0	4	6
Tobacco unmanufactured—			
Containing 10 lbs. or more of moisture in every 100 lbs. weight thereof the lb.	0	3	2

	£	s.	d.
Containing less than 10 lbs. of moisture in every 100 lbs. weight thereof . . . . . the lb.	0	3	6
There is allowed on tobacco exported, or deposited in a bonded or Queen's warehouse, as the case may be, the drawback of three shillings and threepence named in section one of the Manufactured Tobacco Act, 1863.			
Wine, viz.:—			
Wine not exceeding 30 degrees of proof spirit . . . . . the gallon	0	1	0
Wine exceeding 30 but not exceeding 42 degrees of proof spirit . . . . . the gallon	0	2	6
And for every degree or part of a degree beyond the highest above charged an additional duty . . . . . the gallon	0	0	3
The word "degree" does not include fractions of the next higher degree.			
"Wine" includes lees of wine.			
Additional; sparkling wine in bottle . . . . . the gallon	0	2	0

	£
Speaking roughly, duties received from Tobacco . . . . . amount to	10,700,000
" " " Spirits . . . . . "	4,300,000
" " " Wines . . . . . "	1,200,000
" " " Tea . . . . . "	3,000,000
" " " Coffee and Chocolat . . . . .	203,000
" " " Dried Fruits . . . . .	396,000

**Custos Rotulorum.**—This title is borne by the first civil officer for the county by virtue of his being nominally keeper of the rolls or records of the sessions of the peace and of the commission of the peace itself, though by statute the actual custody and responsibility for the safe keeping of these documents is in the clerk of the peace (51 & 52 Vict. c. 41, s. 83 (3)). Frequently the office is held by the Lord Lieutenant, and almost invariably it is vested in some nobleman or gentleman of high rank. He is always one of the commission (Holt, C.J., in *Harcourt v. Fox*, 1693, 1 Show. 507), and is, says Lambard (bk. iv. c. 3), "among them of the quorum a man for the most part especially picked out either for wisdom, countenance, or credit." As to the origin of the office, see the judgments in *Harding v. Pollock*, 1829, 6 Bing. 25. Until 1545 his appointment lay with the Lord Chancellor, but in that year the right was transferred to the Crown, which nominates to the office under the sign manual (37 Hen. viii. c. 1, s. 1, confirmed by 1 Will. & Mary, c. 21, s. 3). Formerly he had the appointment of the clerk of the peace for the county, but since 1888 this power has been in the standing joint committee of the County Council and Quarter Sessions (51 & 52 Vict. c. 41, s. 83 (2)). His jurisdiction, however, has been extended to places that are by the Local Government Act made part of his county (*id. ibid.*, s. 59 (2)). Special provisions are contained in 6 & 7 Will. iv. c. 87, ss. 2, 6, 9, 10, as to Cawood, Wistow, and Otley; in 6 & 7 Will. iv. c. 19, s. 3, as to the County Palatine of Durham; in 6 & 7 Will. iv. c. 87, s. 7, as to the Isle of Ely; in 37 & 38 Vict. c. 45, as to the county of Hertford; in 6 & 7 Will. iv. c. 87, s. 6, as to Ripon (Yorkshire); in 6 & 7 Will. iv. c. 87, ss. 3, 6, as to Southwell (Nottinghamshire); and in 34 & 35 Vict. c. 73, s. 4, as to the County Palatine of Lancaster, of which the Chancellor of the Duchy is *custos rotulorum*. As to Ireland, see 1 & 2 Will. iv. c. 17, s. 3.

**Cutting and Wounding.**—1. Cutting and wounding is a phrase used to describe the offence now constituted under secs. 18, 20 of the

Offences against the Person Act, 1861, which is a form of BATTERY. See BATTERY; BODILY HARM; WOUNDING.

The expression originated from the terms of the now repealed Act, 43 Geo. III. c. 58, which contained the terms "cut, stab, or wound," under which a distinction was drawn between incised and contused wounds (*R. v. M'Dermot*, 1818, Russ. & R. 356), which is rendered immaterial by the wording of the present enactments.

2. Cutting certain kinds of property with intent to steal or do mischief or damage is punishable under the Larceny Act, 1861, and the Malicious Damage Act, 1861. See LARCENY; MALICIOUS DAMAGE.

**Cycling.** — Bicycles, tricycles, velocipedes, and other similar machines are "carriages"<sup>1</sup> within the meaning of the Highway Acts (the provisions of which as to proceedings for furious driving therefore apply to them (see HIGHWAYS)), and the following additional regulations are to be observed by any person or persons riding or being upon such carriages: (a) During the period between one hour after sunset and one hour before sunrise, every such person is to carry attached to his vehicle a lamp so constructed and placed as to exhibit a light in the direction in which he is proceeding, and so lighted and kept lighted as to afford adequate means of signalling the approach or position of the carriage. Military cyclists have no rights beyond those of civilians in regard to this provision; each member of a cyclist section must carry a lamp in accordance with the statutory requisition, and it is not sufficient for the officer in charge of the section to do so (see case noted in *Law Journal*, vol. xxxi. p. 284). (b) Upon overtaking any cart or carriage, or any horse, mule, or other beast of burden, or any foot passenger on the carriage-way, the rider is, within a reasonable distance from and before passing such cart or carriage, etc., by sounding a bell or whistle, or otherwise, to give audible and sufficient warning of his approach. On summary conviction, an offender against any of these provisions is liable to a maximum penalty of 40s. for each offence (Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 85). Prior to this enactment, regulations as to cycling might be made by local authorities under sec. 26, subs. (5) of the Highways and Locomotives (Amendment) Act, 1878, and sec. 23, subs. (1) of the Municipal Corporations Act, 1882, and by-laws made under these provisions, and existing at the date when sec. 85 of the Local Government Act, 1888, took effect (1st April 1889) would seem to be saved from repeal by sec. 123 of the Act.<sup>2</sup>

A bicycle has been held not to be a "carriage" so as to be liable for tolls under a local Act (*Williams v. Ellis*, 1880, 5 Q. B. D. 175).

[*Authorities.*—See the ordinary text-books on Highways and Local Government, lists of which are appended to the articles on these subjects.]

**Cy-près.**—See CHARITIES, vol. ii. p. 470.

<sup>1</sup> It was held in 1879 that a person riding a bicycle on a highway at such a pace as to be dangerous to the passers-by, might be convicted of furious driving a "carriage," under sec. 78 of the Highway Act, 1835, 5 & 6 Will. IV. c. 50 (*Taylor v. Goodwin*, 1879, 4 Q. B. D. 228).

<sup>2</sup> A constable cannot arrest without warrant for breach of such regulations (*Hatton v. Treeby*, 1897, 66 L. J. Q. B. 729); nor has he the right to stop a cyclist riding without a lamp or contravening any of the other regulations above referred to for the purpose of obtaining his name and address (*Hatton v. Treeby*, *supra*).

**Cyprus.**—An island in the Mediterranean, formerly governed by lieutenants of the Byzantine Emperors; occupied in 1191 by Richard I. of England, and assigned by him, first to the Knights Templars, afterwards to Guy de Lusignan, whose descendants retained the sovereignty until 1489, when they were ousted by the Venetian Republic. From 1425 onward, the island paid tribute to Egypt. In 1571 Cyprus was added to the dominions of the Sultan of Turkey. On 4th June 1878 the Sultan assigned the island to be occupied and administered by the British Government; the provisions of the treaty are set forth in the *Colonial Office List*. The existing Government was constituted under Orders in Council of the 14th September 1878 and 30th November 1882. Executive authority is intrusted to a High Commissioner; there is a Legislative Council, consisting of six non-elective members, and twelve elective members, three elected by Mohammedan and nine by non-Mohammedan taxpayers. There is a Supreme Court, which now consists of two judges, and a tolerably complete system of local Courts. From the Supreme Court there is an appeal to the Queen in Council. See PRIVY COUNCIL for conditions of appeal.

[*Authorities.*—For the laws of Cyprus, reference may be made to *The Destour*, or official compilation of laws, published at Constantinople; *Législation Ottomane*, by Aristarchi Bey, contains a French translation of the more important laws. See also W. E. Grigsby, *The Medjelle*, a translation of the Ottoman Civil Code (Nicosia, 1895); F. Ongley, *The Ottoman Land Code* (London, 1892); *Cyprus Laws and Ordinances*, published by the British authorities; and the *Cyprus Law Reports*.]

**Dairies.**—It has long been recognised by medical authorities that milk is specially likely to receive and convey infection. Dairies and places where it was dealt with and distributed were not, however, placed under the control of the sanitary authorities charged with the protection of the public health till the year 1886. The Contagious Diseases Animals Act, 1878, 41 & 42 Vict. c. 74, s. 34, enabled the Privy Council to make orders (1) for the registration with the local authority of all persons carrying on the trade of cowkeepers, dairymen, or purveyors of milk; (2) for the inspection of cattle in dairies, and for prescribing and regulating the lighting, ventilation, cleansing, drainage, and water supply of dairies and cowsheds in the occupation of persons following the trade of cowkeepers or dairymen; (3) for securing the cleanliness of milk stores, milk shops, and of milk vessels used for containing milk for sale by such persons; (4) for prescribing precautions to be taken for protecting milk against infection or contamination; (5) for authorising a local authority to make regulations for the above purposes or any of them, subject to such conditions, if any, as the Privy Council might prescribe. The local authorities for the execution of that Act were the town councils in boroughs, and elsewhere, the magistrates assembled in Quarter Sessions, who were then the county authorities. In pursuance of the powers so given, an Order in Council was issued on June 15, 1885, dealing with the above matters.

The Contagious Diseases Animals Act of the next year (49 & 50 Vict. c. 32, s. 9) transferred the control from the Privy Council to the Local Government Board, and gave the local administration to the local sanitary authorities. An amending order was subsequently issued on November 1, 1886, which is to be read with the earlier order.

These orders are still in force. Under them the sanitary authority must keep a register of all persons carrying on in their district the trade of cow-keepers, dairymen, or purveyors of milk. No one who is not registered may lawfully carry on such trade. Persons who have dairies for the purpose only of making butter or cheese, and who do not purvey milk, and persons who only sell milk of their own cows in small quantities to their workmen or neighbours, are not considered to be dairymen, and need not be registered. Buildings newly occupied as dairies or cowsheds since June 1886 must have adequate provision for lighting, ventilation, cleansing, drainage, and water supply, to ensure (a) the health and good condition of the cattle therein; (b) the cleanliness of vessels used for containing milk for sale; and (c) the protection of the milk against infection or contamination. Persons suffering from any dangerous infectious disorder, or who have recently been in contact with persons so suffering, may not milk cows, handle vessels used for containing milk, or in any way take part in the business, so far as regards the production, distribution, or storage of milk. No dairy or room used as a milk store or milk shop may communicate directly with any closet, etc., or be used as a sleeping apartment, or in any manner likely to cause contamination of the milk therein. Pigs may not be kept in any building used for keeping cows, or in any place used for keeping milk for sale. The milk of a diseased cow may not be mixed with other milk or sold for human food at all, nor may it be used for pigs or other animals until it has been boiled.

Local authorities may also make special regulations for inspection of cattle in dairies, and for carrying out the other matters above mentioned, subject to the approval of the Local Government Board, who may direct the revocation of any regulation which they consider of too restrictive a character or otherwise objectionable. Any person guilty of an offence against the provisions of the orders is liable to a penalty not exceeding £5, and £2 for each day on which the offence continues after written notice from the local authority.

Where the Infectious Diseases Prevention Act, 1890, 53 & 54 Vict. c. 34, has been adopted, a medical officer of health, if in possession of evidence that any person in the district is suffering from infectious disease attributable to milk supplied from any dairy situate either within or without the district, or that the consumption of milk from such dairy is likely to cause infectious disease to any person residing in his district, may inspect the dairy and the animals therein. If on such inspection he is of opinion that infectious disease is caused from consumption of the milk, he is to report to the local authority, who, if they think it right, can prohibit the dairyman from supplying milk in their district until they are satisfied that the milk supply has been changed or the cause of the infection has been removed (s. 4).

**Damage (Admiralty).**—In the modern statutes extending the Admiralty jurisdiction to damage arising within a body of a county, the word is to be construed in the same way as under the old Admiralty jurisdiction; and the words of the Admiralty Court Act, 1840, giving the Court jurisdiction over “all claims and demands whatsoever in the nature of . . . damage received by any ship or seagoing vessel” (3 & 4 Vict. c. 65, s. 6), and those of the Admiralty Court Act, 1861 (24 Vict. c. 10, s. 7), giving jurisdiction over “any claim for damage done by any ship,” include every kind of injury to person or property inflicted by a ship, or sustained by a ship from person or property (see *The Zeta*, [1893] App. Cas. 468, Lord

**Herschell**). For instances of collisions between ships and persons, or things other than ships, see COLLISIONS. The words "damage done by any ship" include injury to persons (*The Sylph*, 1867, L. R. 2 Ad. & Ec. 24, a diver struck by a steamer's paddlewheel; *The Beta*, 1869, L. R. 4 P. C. 447, a mariner injured in a collision between two ships); but the ship must be the "active cause" of the damage or the "noxious instrument" (*The Vera Cruz*, 1884, 9 P. D. 96, Brett, M. R., and Bowen, L.J.); and personal injury otherwise caused, e.g. a man falling down a hatchway of a ship owing to its being insufficiently covered, is not within these words (*The Theta*, [1894] Prob. 280, Bruce, J.).

As to the County Court jurisdiction, see ADMIRALTY ACTION, vol. i. p. 142, and COUNTY COURTS, vol. iii. p. 541. See also COLLISIONS; CARGO; DOCK; and authorities cited at the end of these articles respectively.

## Damages.

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### I. PRINCIPLES OF ASSESSING DAMAGES.

Very various principles have from time to time been adopted of assessing damages, and it may be questioned whether we have yet attained in England to any very logical principle, or to any completely satisfactory rule. At first, no doubt, a civil action was but a substitute for private vengeance. The law no longer permitted the person injured to redress his grievance himself: the law took upon itself to determine the amount of compensation which the plaintiff should receive: but it was for that very reason careful to give him much what he would have exacted himself if he had been allowed a free hand. Take, for instance, the action for theft at Rome. If the thief was caught in the act, or on the spot (*fur manifestus*), the owner of the thing stolen might, under the early law of the XII. Tables, scourge the thief; and if he were a freeman, sell him as a slave; or if he were a slave, might kill him. But before the time of Gaius it was felt that such a punishment was too severe; and the praetor's edict established that the thief must return the property to the owner, and also pay him four times its value. But if the thief was not taken in the act, or on the spot, then the XII. Tables enacted that he must return the thing which he had stolen, and pay the owner in addition twice its value. In either case the penalty imposed was far in excess of the loss which the plaintiff had actually sustained, so that it was a benefit peculiarly to an ancient Roman to have his chattels purloined. Note also the distinction between the penalties paid by the manifest and the non-manifest thief. Both these incidents show clearly that the measure of damages was fixed solely with a regard to the feelings which might be expected to actuate an owner of property who was wreaking his vengeance on a detected thief. Traces of the same policy linger in our own land laws. A tenant who does not deliver up possession of his holding in obedience to a notice to quit must, by the Statute 11 Geo. II. c. 19, s. 18, pay his landlord double rent; if he holds over after the expiration of his term, he must, under the Statute 4<sup>th</sup> Geo. II. c. 28, s. 1, pay his landlord double the value of his hold-

ing. Then, again, by sec. 209 of the Common Law Procedure Act, 1852, a tenant who does not "forthwith" inform his landlord that he has been served with a writ in ejectment forfeits three years' rent. And it would seem that the tenant must pay this arbitrary sum, even though his landlord had already had notice from the plaintiff's solicitors that such an action was threatened. So, under the Statute 2 Will. & Mary, sess. 1, c. 5, s. 3, he who breaks a pound must pay treble damages and treble costs; and yet it has been held that such a proceeding is not a penal action (*Castleman v. Hicks*, 1842, 2 Moo. & R. 422)! In all these cases it is clear that our law has regard, mainly, if not solely, to the injured feelings of the plaintiff; and makes no attempt to accurately assess the damage which the defendant's act has really caused.

Then, as society advances, men begin to see that this is not quite fair to the defendant; and the next stage, apparently, is to let the parties, if they will, assess the damages beforehand, and settle what will be the proper sum to be paid in each event. This sounds fairer, no doubt, because each party has a voice in the matter. But in most cases the apparent fairness of this method is illusory. Borrower and lender are not really on equal terms; nor sometimes are landlord and tenant. If a tenant is really anxious to take a particular farm, he will often sign a lease containing the most stringent conditions, and agree to pay £1000 as liquidated damages in case he breaks any one of them. And in former days he would have been compelled to pay the £1000, though the loss resulting from his breach to the landlord was less than half a crown. So, too, under the Tudors and the Stuarts, it was the regular and customary thing for a man who was borrowing £500 for six months to solemnly enter into a bond under seal for £1000. And if he failed to pay back the £500 on the last day of the six months, he was liable to pay the full £1000. It was not regarded as at all extortionate for the creditor to insist on cent. per cent. if his debtor was one day behind-hand in paying the debt. And this remained the law till the days of Queen Anne (4 & 5 Anne, c. 16); for the borrower, it was urged, had expressly agreed to those terms. But now the tendency is to go to the opposite extreme; our law, or rather our Legislature, is almost too prone to allow persons in default to slip out of their contracts.

Next, moral considerations intervened. In some cases, it was felt, the plaintiff had a right to be angry, and to exact the uttermost farthing; but in others, e.g. where the injury was done unintentionally, he ought to be reasonable and moderate his indignation. And so the practice arose of not looking solely at the plaintiff's loss, but of considering also the defendant's conduct in the matter. If he had acted wantonly, callously, or brutally, he ought, it was thought, to pay the plaintiff more damages than if he had behaved like a gentleman; although in both cases the actual pecuniary loss sustained by the plaintiff would be identical. In other words, the damages are to be meted out according to the feeling of annoyance and indignation which a reasonable plaintiff would properly feel at being so treated. We still have such considerations urged on a jury in actions for breach of promise of marriage. The plaintiff has lost a marriage which was worth, say, £1000 to her. If the defendant acted with proper feeling and decorum when he broke off the engagement, the jury will find a verdict for just the £1000. If, however, he acted harshly and selfishly, with no regard to the girl's feelings, he must pay £1200. If, again, he is foolish enough to make any imputation on the lady's character which he fails to prove, then the damages will probably rise to £2000. In other words, the lady benefits pecuniarily because the man to whom she was once engaged is a brute.

So, too, a plaintiff who has sustained damage through a deliberate fraudulent misstatement always recovers more damages than he would if the misrepresentation was made innocently, although the injury done to him is the same in either case. In the latter case, as a rule, he can only get the contract rescinded. A similar instance is cited in the Digest. If Titius let pasture land on which grew poisonous or injurious herbs, and his tenant's cows eat the herbs and died in consequence; then, if Titius did not know such herbs were there, he was bound merely to remit the rent; but if he knew it, he had in addition to pay for the value of the cows and all other damage which his tenant had sustained (D. 19, 2, 19, 1). By the law of England, it is conceived, no action would lie in either case unless there was some express warranty. But we have a precisely similar rule in cases of underground trespass into the coal mine of an adjoining owner. There the measure of damages is the actual value at the pit's mouth of the coal wrongfully abstracted, after deducting, in the case of accidental trespass, the cost of severance and "bringing to bank"; but in the case of deliberate trespass, the cost of bringing to bank only, nothing being allowed for "getting" the coal (*Martin v. Porter*, 1839, 5 Mee. & W. 351; *Eccllesiastica' Commissioners v. North-Eastern Ry. Co.*, 1877 4 Ch. D. 845); yet the plaintiff's loss is the same whether the trespass was deliberate or accidental. Why should he benefit because his neighbour is a rascal? In many classes of action besides those already mentioned (e.g. libel, slander, false imprisonment, malicious prosecution, seduction, etc.) the plaintiff is allowed to recover additional damages, over and above his real loss, because the defendant acted recklessly, dishonestly, or maliciously; and this will always be the case so long as damages are assessed by a jury. See vol. i. p. 203.

Now let us leave out of account all these cases in which vindictive damages may be awarded, and confine our attention to the unimpassioned inquiry:—By what principles should the jury be guided in assessing the loss which the plaintiff has, in fact, sustained as the result of the defendant's act? In cases of injury to the person or to the reputation of the plaintiff, there is often no pecuniary loss at all; yet it is clearly right that the defendant should recompense the plaintiff for the insult, the indignity, and the pain caused by a gross libel or a public assault, or by being marched through the streets in custody. In all such cases the jury may compensate the plaintiff for injured feelings and for injured pride; for this is clearly part of the damage. But in actions for breach of contract, or for injury to property, our law is much more niggardly, and seldom allows a plaintiff a full recompense for his loss. Consequential damage, though in fact sustained, is frequently excluded as remote (see *post*, p. 106). Thus, if a man promises to lend me a certain sum of money on a certain day, and I make all my arrangements, relying on that promise, I can recover only nominal damages at the most, if he breaks his word, though the injury to my credit be enormous, and my actual pecuniary loss considerable. (See the remarks of Jessel, M. R., in *Wallis v. Smith*, 1882, 21 Ch. D. at p. 257.)

And even in assessing the actual value of the property injured or not delivered, the law too strictly adheres to the principle of market value. If a man breaks in pieces a gold watch which the Duke of Wellington gave to my grandfather, is he to pay me merely the second-hand price of any other similar old watch? Am I to be allowed nothing for the special value which I attached to that watch because of its history and associations? It does not matter to me whether the defendant knew its history or not; I did, and I have lost it. I would not have sold it for £100. Can I claim, there-



fore, that the market value of that particular watch is £100? The judge would probably call that "a fancy value," and allow the history of the watch to affect the damages only so far as experts called before him could swear that it would have enhanced the selling-price of the watch at an auction. Yet, of course, there are cases in which special circumstances are allowed to increase the value of the article removed or injured. That article may have a special value as being one of a set, and the value of the set as a whole may be reduced by much more than the market price of the one article, *e.g.* one volume out of a complete edition; one dish out of a Dresden dinner service; one horse out of a pair used to running in harness together. In each of these cases the defendant must pay for the diminished value of the complete set or pair. This was so also in Rome (*Lex Aquilia*, 22, § 1). So, too, a trespasser in A.'s coal mine will be liable not only for the coal which he has removed, but also for the coal which he has rendered less valuable by his unskilful working (*Williams v. Raggett*, 1877, 46 L. J. Ch. 849). But we do not go so far as did the later Roman law in allowing the plaintiff, in addition to the market value of his property, compensation for everything which he has lost through the act of the defendant. With us the plaintiff is not entitled to be replaced at the expense of the defendant in precisely the same position as he would have occupied if no tort or breach of contract had occurred; in other words, he cannot recover his whole interest in the thing injured or destroyed. But see Paulus, xxii, and Grueber, p. 58.

On the other hand, it may be the case that the plaintiff attached no special value to the thing; as in *Armory v. Delamirie* (1722, 1 Smith, L. C., 9th ed., 385) he may not know its value; while the possession of it may be of the greatest importance to the defendant. A letter in my possession may be of enormous value to the defendant as a link in his chain of evidence in some law suit. Or I may own a rare coin, or a valuable china vase, which he is eager to add to his collection to complete his set. He may have wrongfully taken possession of a little triangle of my land running up into his, the ownership of which would save him some 400 yards of fencing. Or, again, it may be a matter of the greatest pecuniary importance to the defendant to reach London in five hours; he therefore takes my horse and rides it to death. On what principle should the damages be assessed in such cases as these; at the figure for which the plaintiff might have been willing to sell, or at the figure which the defendant in his urgency might have been willing to give?

In most cases the law would reply, "At neither of those figures, but at the fair market value of the thing taken." There are cases, however, in which our law does take into consideration the fact that for some special reason the property in question is of more value to the defendant than it is to the plaintiff, and compels him to pay that higher value. Thus in the recent case of *Whitwham v. Westminster Brymbo Coal and Coke Co.*, [1896] 1 Ch. 894; 2 Ch. 538, the defendants trespassed on the plaintiffs' land by tipping on to it spoil from their colliery. They did this openly and with the knowledge of the plaintiffs. But it was held in the Court of Appeal that the value of the land for the purposes for which it was actually used by the defendants ought to be taken into consideration in assessing the damages as to so much of the land as was, in fact, covered with spoil, and that as to the rest of the land the measure of damages was the diminution in its value to the plaintiffs by reason of the wrongful acts of the defendants. And see the wayleave cases, *Jegon v. Vivian*, 1871, L. R. 6 Ch. 742, and *Phillips v. Homfray*, *ibid.* 770.

## II. SUMMARY OF THE EXISTING LAW.

The leading rules which now govern damages in England may be stated thus:—

1. In certain actions, such as libel, slander, seduction, and breach of promise of marriage, the jury is permitted to award to the plaintiff *vindictive* (or *retributory* or *exemplary*) damages in excess of the amount which would adequately compensate him for all injury inflicted (see vol. i. p. 203).

2. In all other actions the damages are limited to the loss which the plaintiff has actually sustained. Indeed, it often happens that the jury is not permitted to award the successful plaintiff full compensation for the whole of such loss. They may only compensate him for—

(i.) Any damage which is the natural or the probable consequence of an act such as that done by the defendant, whether the defendant contemplated such a consequence or not;

(ii.) Any damage which the defendant did in fact contemplate

(a) At the time when he entered into the contract as a natural or probable consequence of a breach of that contract;

(b) At the time when he committed the tort as a natural or probable consequence of such tort.

(iii.) Any damage which is the probable result of the defendant's act, provided that whenever the probability of such a result ensuing depends upon the special circumstances of the particular case, the defendant will not be liable to compensate the plaintiff for such result, unless he had notice of such special circumstances at the time of his (a) making the contract, (b) committing the tort.

3. All other damage which the plaintiff may have sustained the judge will exclude from the consideration of the jury as being too remote.

By "natural consequence" is meant such a result as must follow from the defendant's act in the ordinary course of nature, in short, a consequence which is physically necessary; by "probable consequence," such a consequence as, human nature being what it is, usually follows from such an act as the defendant's, or so frequently follows that a person of ordinary intelligence and foresight would reasonably anticipate such a result.

Restricting the words to these meanings, the paragraphs numbered (i.), (ii.), (iii.) above appear to state with accuracy what is left of the three rules in *Hadley v. Baxendale*, 1854, 9 Ex. Rep. 341; after the minute criticism which they have received in the judgments in many subsequent cases, and notably in *The British Columbia Saw Mill Co. v. Nettleship*, 1868, L. R. 3 C. P. 499; *Horne v. Midland Ry. Co.*, 1873, L. R. 8 C. P. 131, 137; *Baxendale v. L. C. & D. Ry. Co.*, 1874, L. R. 10 Ex. 35; *Sanders v. Stuart*, 1876, 1 C. P. D. 326; *Hydraulic, etc., Co. v. McHaffie*, 1878, 4 Q. B. D. 670; *Grébert-Borgnis v. Nugent*, 1885, 15 Q. B. D. 85; *Hammond v. Bussey*, 1887, 20 Q. B. D. 79; and *Mowbray v. Merryweather*, [1895] 2 Q. B. 640.

## III. DAMAGES IN ACTIONS OF CONTRACT.

In actions for breach of contract it was originally laid down that it was the duty of the jury to assess as accurately as they could the difference between the financial position in which the plaintiff found himself with the contract broken, and that in which he would have been if the contract had been duly performed. And no doubt in many cases that difference is still *prima facie* the amount to which he is entitled as damages. "He is, so far

as money can do it, to be placed in the same situation as if the contract had been performed," says Parke, B., in *Robinson v. Harman*, 1848, 1 Ex. Rep. 855. But it was soon discovered that this rule included losses which the defendant could not reasonably be expected to anticipate. Thus in the leading case of *Hadley and Another v. Baxendale and Others*, 1854, 9 Ex. Rep. 341, the plaintiffs were owners of a steam flour mill, the shaft of which was broken; they sent it to the defendants, who were carriers, to take to an engineer, to serve as a model for a new shaft. The defendants' clerk was told at the time that the mill was stopped, and that the shaft must be forwarded immediately. But he was not told that the want of the shaft was the only thing which was keeping the mill idle. The delivery of the shaft was delayed for an unreasonable time, and in consequence the plaintiffs could not work their mill. But it was held that they could not recover any damages for their loss of profits while the mill was kept idle; because such loss of profit was not the natural consequence of a delay in forwarding a broken shaft; and the defendants had not sufficient notice of the special facts of the case to make it clear to them that such a loss was a probable result of such delay. It was not, in short, a consequence which might fairly and reasonably be presumed to have been contemplated by the parties when they made the contract. And ever since this decision it has been the rule in England that on a breach of contract the party breaking his contract must pay the other party only such damages as are the natural and necessary consequences of the breach, together with all such further and other damages as owing to the special circumstances of the particular case must be taken to have been in contemplation of the parties at the time when the contract was made (*Hinde v. Liddell*, 1875, L. R. 10 Q. B. 265).

Another principle has sometimes been suggested for assessing damages in actions for breach of contract, namely, that if one of the parties omits or refuses to perform his part of it, the other may perform it for him as nearly as may be, and may claim from him as damage the reasonable expense of so doing (*Prehn v. Royal Bank of Liverpool*, 1870, L. R. 5 Ex. 92; *Hinde v. Liddell*, 1875, L. R. 10 Q. B. 265; *Le Blanche v. London and North-Western Ry. Co.*, 1876, 1 C. P. D. 286, 313). In many cases, no doubt, the jury may arrive by this method at a figure approximately correct. But it must be admitted that the cost of performance is not as a rule the proper measure of damage (*Wigsell v. School for Indigent Blind*, 1882, 8 Q. B. D. 357, 364).

The mere fact that the defendant has broken his contract entitles the plaintiff to at least some nominal damages, say, forty shillings. The difficulty always arises as to the further amount claimed. Damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances were known to the defendant at the time when he entered into the contract. If, however, such special circumstances were previously known, or were communicated, to him at that time, and the damage sought to be recovered flows naturally from the breach of contract under these special circumstances, then that damage is recoverable, whether it was in fact contemplated by the parties to the contract or not. It is not necessary that the defendant should expressly undertake to be answerable for such damage, nor is it necessary that he should have express notice that a breach of the contract would in such special circumstances cause such damage; it is enough if he had distinct notice of the special circumstances which rendered it necessary or probable

that such damage would flow from the breach. Notice of such special circumstances after the contract was made will not avail, as it cannot be inferred from such notice that the defendant ever consented to become liable for such special damage (*British Columbia Saw Mill Co. v. Nettleship*, 1868, L. R. 3 C. P. at pp. 505, 506). But if after notice of the special circumstances he deliberately enters into the contract he may reasonably be supposed to have contemplated as the probable result of any breach of it all damage which arises naturally or probably out of such special circumstances. See *Simpson v. London and North-Western Ry. Co.*, 1876, 1 Q. B. D. at p. 277, and *Great Western Ry. Co. v. Redmayne*, 1866, L. R. 1 C. P. 329.

Now let us apply these general rules to certain special classes of action.

*Alternative Performance.*—If a contract be made in the alternative, so that it can be performed in one or other of two ways at the election of the defendant, and he does neither, the damages will be assessed against him on the alternative which is least profitable to the plaintiff, and least burdensome to the defendant (*Cockburn v. Alexander*, 1848, 6 C. B. 791, 814; *Derrell v. Burnell*, 1873, L. R. 8 C. P. 480). But if the defendant by his own act renders performance of the contract in one way impossible, and then fails to perform it in the other, the damages must be measured according to the second alternative, which is the only one left open (*McIlquham v. Taylor*, [1895] 1 Ch. 53, 62).

*Money Lent.*—"The normal measure of damages for non-payment of money is interest, where interest is allowable by contract or by law" (per Chitty, J., in *In re English Bank of the River Plate*, [1893] 2 Ch. at p. 446).

*Breach of a Promise to Lend Money.*—For this, as a rule, only nominal damages can be recovered. The plaintiff is supposed to be in such good credit that he can easily borrow the same sum elsewhere. And a contract to take debentures of a company is a contract to lend money; the only remedy for breach of such contract is an action for damages in respect of the loss which has been actually sustained by the breach, and if no actual loss is proved, nominal damages only can be recovered (*South African Territories Limited v. Wallington*, 1897, 76 L. T. 520).

*Non-Delivery of Goods.*—If goods be not delivered at the time and place agreed on, and the plaintiff has not yet paid the price, the measure of damage is merely the difference between the contract price and the market value on or about the day of breach; for the plaintiff is bound to act reasonably, and he might have bought other goods immediately in the open market. If there was a market in which the plaintiff could have purchased similar goods, and no difference is proved between the contract price and the market price on the day of the breach, only nominal damages can be recovered (*Valpy v. Oakley*, 1851, 16 Q. B. 941). If there be no such market, the jury must assess the value of the goods at time of breach as best they may (*Borries v. Hutchinson*, 1865, 18 C. B. N. S. 445, 465; *Hinde v. Liddell*, 1875, L. R. 10 Q. B. 265; *Schulze v. Great Eastern Ry. Co.*, 1887, 19 Q. B. D. 30). The same rule applies to the non-delivery of stock or shares in a company (*Shaw v. Holland*, 1846, 15 Mee. & W. 136; *Tempest v. Kilner*, 1846, 3 C. B. at p. 253). But if a ship be ordered to be built, or be left for repairs, and be not delivered by, or repaired within, the time stipulated, the measure of damages is *prima facie* the sum which would have been earned by the ship in the ordinary course of trade since the period when it should have been delivered (*Fletcher v. Tayleur*, 1855, 17 C. B. 21; *The Argentino*, 1889, 14 App. Cas. 519; *Fitzgerald v. Leonard*, 1892, 32 L. R. Ir. 675; *Welch v. Anderson*, 1892, 61 L. J. Q. B. 167).

Where the purchaser has made a contract for the resale of the goods, and the vendor is aware of this, the purchaser may recover damages for the loss of his profit on such resale, and also in respect of the penalties or other damages for which he is liable to his purchaser; not necessarily to the full extent of his liability over, though the jury may award him the full amount if they deem it reasonable (*Hydraulic Engineering Co. v. McHaffie*, 1878, 4 Q. B. D. 670; *Elbinger v. Armstrong*, 1874, L. R. 9 Q. B. 473; *Grébert-Borgnis v. Nugent*, 1885, 15 Q. B. D. 85).

*Carriers*.—See CARRIER, vol. ii. p. 394; see further, *O'Hanlan v. Great Western Ry. Co.*, 1865, 6 B. & S. 484, and *Rodocanachi v. Milburn Brothers*, 1886, 18 Q. B. D. at p. 77.

*Not accepting Goods*.—In an action for not accepting goods, the difference between the contract price and the market price on the day the contract was broken is the ordinary measure of damages (*Boorman v. Nash*, 1829, 9 Barn. & Cress. 145). Where goods were to be delivered at a certain time, and while on their way the vendee gave notice that he would not accept them, the measure of damages is the difference between the contract price and the market price\* on the day fixed for the delivery, and not that on the day on which the seller received the notice (*Phillpotts v. Evans*, 1839, 5 Mee. & W. 475). The measure of damages for not accepting stock sold is the difference between the contract price and the market price on the day of the breach of contract. The measure of damage in the case of railway or other shares in companies is the difference between the contract price and the market value on the day of breach, or the earliest day afterwards on which they could be sold (*Pott v. Flather*, 1847, 16 L. J. Q. B. 366).

*Breach of Warranty of a Horse*.—If the horse has been returned, the plaintiff will be entitled to recover the whole price; if the horse is not returned, the difference between his real value and the price; or the plaintiff may sell the horse for what he can get, and recover the residue of the price paid, in damages (*Caswell v. Coare*, 1809, 1 Taun. 566; 10 R. R. 606). If the horse be not tendered to the vendor, the plaintiff can recover no damages for the expense of his keep. But, if he tendered the horse, he may recover for the keep, for such time as would be required to sell him to the best advantage (*McKenzie v. Hancock*, 1826, Ry. & M. 436).

*Breach of Promise of Marriage*.—See vol. ii. p. 238, and consider *Smith v. Woodfine*, 1857, 1 C. B. N. S. 660, 668; and *Frost v. Knight*, 1872, L. R. 7 Ex. 111, 116.

#### IV. DAMAGES IN ACTIONS OF TORT.

In some actions of tort, the jury is permitted to award vindictive or exemplary damages (see *post*, p. 102). In others, special damage is of the essence of the action, and the plaintiff can strictly recover damages only in respect of the special damage pleaded and proved (*post*, p. 103). But between these two extremes lies a large category of actions of tort, in which the rule as to the measure of damages is substantially the same as that already given for actions for breach of contract, viz.: that the defendant is only liable for such damages as he in fact contemplated or ought to have contemplated when he committed the tort. Every man is presumed to intend and to know the natural and ordinary consequences of his acts; and this presumption (if, indeed, it is ever rebuttable) is not rebutted merely by proof that he did not at the time attend to or think of such consequences, or hoped or expected that they would not follow. Hence the defendant will be liable in every case for the natural and necessary consequences of his act, whether he in fact contemplated them or not. He will be liable also for every

consequence which, at the time of committing the tort, he did in fact contemplate as a probable result of his act. But if a particular result is not a natural or necessary consequence of the defendant's act, and can only be recognised as a probable consequence in the light of certain special circumstances peculiar to the particular case, then the defendant will not be responsible for that result, unless he was aware of those special circumstances at the time when he committed the tort.

*Personal Injuries.*—Thus, in an action to recover damages for personal injury caused by the negligence of the defendant, the jury “must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give, what they consider under all the circumstances, a fair compensation” (per Brett, J., in *Rowley v. L. and N.-W. Ry. Co.*, 1873, L. R. 8 Ex. at p. 231; *Phillips v. L. and S.-W. Ry. Co.*, 1879, 4 Q. B. D. 406; 5 Q. B. D. 78; 5 C. P. D. 280). The jury may take into account any reasonable prospect of increasing income which the plaintiff had, and of which he has been deprived by the injury (*Fair v. L. and N.-W. Ry. Co.*, 1869, 18 W. R. 66). They should not take into account any sum the plaintiff has received under a policy of insurance against accidents (*Bradburn v. Great Western Ry. Co.*, 1874, L. R. 10 Ex. 1), or from the charity of benevolent strangers. The plaintiff will be entitled to recover any sum of money reasonably paid, or the amount of any liability reasonably incurred for medical attendance, extra nourishment, and nursing; or for providing a substitute to attend to the plaintiff's business, and do his work while he is ill; but not for any speculative damage, such as the loss of a prize or of a situation, which the plaintiff thinks he would have been sure of gaining, if he had not been injured or detained (*Hoe v. Felton*, 1861, 11 C. B. N. S. 142). If the injuries, in the ordinary course of nature, produce disease or disablement (e.g. if a limb has to be amputated), the defendant must compensate the plaintiff for such consequences. But damages resulting from a nervous shock, caused by fear of a threatened collision, which did not occur, are too remote to be recoverable (*Victorian Ry. Comrs. v. Coultas*, 1888, 13 App. Cas. 222). Where the defendant falsely and maliciously told a wife that her husband had been seriously injured and was in great danger, and the shock caused by such statement brought on a dangerous and serious illness, and the husband was put to expense for medical assistance, Wright, J., allowed the jury to award the plaintiff £100 damages over and above the out-of-pocket expenses incurred (*Wilkinson and Wife v. Downton*, 1897, 76 L. T. 493).

*Fraud.*—In actions of fraud, the jury are apt to treat the plaintiff liberally, although the law draws no distinction between this and other ordinary actions of tort. The plaintiff may clearly recover damages for any injury which is the direct and natural consequence of his acting on the faith of the defendant's fraudulent representations. Thus where a cattle dealer sold the plaintiff a cow, which had foot-and-mouth disease, and fraudulently represented it was free from infectious disease; and the plaintiff placed it with five others, who caught the disease and died, it was held that the plaintiff was entitled to recover, as damages, the value of all six cows (*Mullett v. Mason*, 1866, L. R. 1 C. P. 559; and see *Smith v. Green*, 1875, 1 C. P. D. 92; and *Randall v. Newson*, 1877, 2 Q. B. D. 102). Where the plaintiff was induced by the fraud of the defendant to take up shares, the damages recoverable are the difference between the price paid for them and their *real* value on allotment; this value is not the market value; it may be ascertained by the light of subsequent events, e.g. the estimated

dividend on a liquidation of the company (*Peck v. Derry*, 1887, 37 Ch. D. 541). As to Lord Campbell's Act, see vol. ii. pp. 339-40.

*Trespass*.—In an action of trespass for entering the plaintiff's house, the plaintiff may prove that the defendant did it under a false charge that the plaintiff had stolen goods therein, and the jury may give damages for the trespass, aggravated as it is by such false charge (*Bracegirdle v. Orford*, 1813, 2 M. & S. 77). If the defendant deliberately persists in trespassing on the plaintiff's land after notice that he is trespassing, and uses intemperate and offensive language when civilly requested to withdraw, the jury may give damages for the trespass committed under such circumstances far in excess of any damage sustained by the plaintiff (*Merest v. Harvey*, 1814, 5 Taun. 442; 22 R. R. 253; *Williams v. Currie*, 1845, 1 C. B. 841). So where the defendant wrongfully and negligently injured the plaintiff's stable with the object of compelling him to give up possession of it to the defendant, the jury were allowed to take all the circumstances into their consideration in assessing the amount of damages (*Emblen v. Myers*, 1860, 6 H. & N. 54; and see *Bell v. Midland Rwy. Co.*, 1861, 10 C. B. N. S. 287). As to the measure of damages in COLLISIONS AT SEA, see vol. iii. p. 99.

#### V. LIQUIDATED AND UNLIQUIDATED DAMAGES.

Whenever the amount to which the plaintiff is entitled can be ascertained by calculation or fixed by any scale of charges or any other positive data, it is said to be liquidated or "made clear." But when the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties, and is fixed by opinion or by an estimate, the damages are said to be unliquidated. Thus in an action on a bill of exchange or a promissory note, the amount of the verdict, if it be for the plaintiff at all, can be reckoned beforehand. But in an action of libel, it is open to the jury to award the plaintiff a farthing, or forty shillings, or a hundred pounds; and no one can say beforehand what the precise figure will be.

In actions where the damages are unliquidated, the assessment of damages is peculiarly the province of the jury; and the Court of Appeal will not disturb the verdict, unless it be such as no reasonable men could honestly have found (*Webster v. Friedberg*, 1886, 17 Q. B. D. 736; *Metropolitan Rwy. Co. v. Wright*, 1886, 11 App. Cas. 152; *Praed v. Graham*, 1889, 24 Q. B. D. 53). And in such actions the damages which the jury award may be either—(1) contemptuous; (2) nominal; (3) substantial; or (4) vindictive.

(1) Contemptuous damages are awarded when the jury consider that the action should never have been brought.

(2) Nominal damages are awarded where the action was a proper one to bring, but the plaintiff has not suffered any special damage, and does not desire to put money into his pocket; he has established his right or cleared his character, and is content to accept forty shillings and his costs.

(3) Substantial damages are awarded where the jury seriously endeavour, as men of business, to arrive at a figure which will fairly compensate the plaintiff for the injury he has in fact sustained.

(4) Vindictive or retributory or exemplary damages are awarded where the jury desire to mark their sense of the defendant's conduct, by fining him to a certain extent; they therefore punish the defendant by giving the plaintiff damages in excess of the amount which would be adequate compensation for every loss which he has suffered in consequence of the defendant's act. The jury are allowed to award vindictive damages in actions for breach of promise of marriage, assault, trespass, seduction, libel, slander, false imprisonment, and malicious prosecution.

*Costs.*—The jury in assessing damages ought not to take into consideration the question of costs. This is a matter entirely for the judge.

*Liquidated Damages and Penalty.*—"Liquidated damages," as contrasted with "penalties," denotes the sum which the parties to a contract have themselves agreed on as the damages which would be a fair compensation for a breach of it; whereas a penalty is the sum named in a contract to secure its due performance, not as an agreed valuation of the probable consequences of its breach, but as an amount to be forfeited on a breach, however great or small the actual loss to the plaintiff may prove to be. Formerly the Courts strictly enforced the penalty, but allowed the defendant by paying the penalty to purchase the right to do the thing which he had promised not to do. Now the tendency of our judges is to restrict the amount to be paid by the defendant to the damage which the plaintiff has in fact sustained, but at the same time (in a proper case) to grant the plaintiff an injunction to restrain any repetition of the act.

The fact that the parties state expressly in their contract that the sum named is liquidated damages, and not a penalty, will not prevent the Court's deciding that it is a penalty (*Thompson v. Hudson*, 1869, L. R. 4 H. L. at p. 30). Where the contract contains a variety of stipulations of different importance, and one sum is stated to be payable on breach of performance of any one of them, then, although it be called by the name of liquidated damages, it is in reality a penalty, and the actual damage sustained is alone recoverable (*Magee v. Lovell*, 1874, L. R. 9 C. P. 107; and see *Wallis v. Smith*, 1882, 21 Ch. D. 243; *Willson v. Lorc*, [1896] 1 Q. B. 626; *Jones v. Hough*, 1879, 5 Ex. D. 115; *Rayner v. Rederiaktiebolaget Condor*, [1895] 2 Q. B. 289). But where the parties name a sum which is to be paid as liquidated damages in one event only, this will be regarded as liquidated damages and not a penalty, and will then bind both parties (*Lea v. Whitaker*, 1872, L. R. 8 C. P. 70; *Law v. Local Board of Ridditch*, [1892] 1 Q. B. 127).

And see INJUNCTION.

## VI. GENERAL AND SPECIAL DAMAGES.

There is another distinction of considerable importance, namely, that between (1) general, and (2) special damages.

*General damages* are such as the law will presume to be the natural or probable consequences of the defendant's act. They need not be proved by evidence; for they arise by inference of law, even though no actual pecuniary loss has been, or can be, shown. Whenever the defendant breaks his contract or violates any absolute legal right of the plaintiff's, general damage to at least a nominal amount will be implied (*Ashby v. White*, 1704, 1 Sm. L. C., 10th ed., 231; *Marzetti v. Williams*, 1830, 1 Barn. & Adol. 415; *Beaumont v. Greathead*, 1846, 2 C. B. 494; *Sanders v. Stuart*, 1876, 1 C. P. D. 326). In such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's right.

*Special damages*, on the other hand, are such as the law will not infer from the nature of the act complained of; they must therefore be specially claimed on the pleadings, and strictly proved at the trial. Such damages depend upon the special circumstances of the case, upon the defendant's position, upon the conduct of third persons, etc. Very probably they would not have been incurred had the same act been done on another occasion, or to a different plaintiff. In some actions of tort, where no actual and positive right of the plaintiff has been infringed, special damage is essential



to the cause of action; and if it be not proved, the plaintiff will be nonsuited. The term "special damage" has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff has sustained beyond what is sustained by the general public; such particular loss is essential to the cause of action.

Where, however, special damage is not essential to the cause of action, the plaintiff is entitled to recover general damages without proof of actual pecuniary loss. Still, in this case, if any special damage has in fact been suffered, the plaintiff can claim to be compensated for this in addition to his general damages, provided he has set out such claim in his pleading, so that the defendant may not be surprised at the trial. Should the plaintiff in such a case fail to prove his special damage at the trial, he may still resort to and recover general damages. A plaintiff who succeeds in recovering general damages may yet be ordered to pay the costs occasioned by a claim for special damage which he has failed to substantiate (*Forster v. Farquhar*, [1893] 1 Q. B. 564).

*Special Damage when essential to the Cause of Action.*—The law is very strict as to special damage, where it is necessary to support the action. In such a case the plaintiff must prove the loss of money, or of some other material temporal advantage. The loss of a marriage, of employment, of income, of custom, of profits, and even of gratuitous entertainment and hospitality, will be special damage if the plaintiff can show that it was caused by the defendant; but not pain of mind, annoyance or vexation, or even physical illness so occasioned. A mere apprehension of future loss is not special damage. Such damage may be either the loss of some right or position already acquired, or the loss of some future benefit or advantage the acquisition of which is prevented. Thus, if the defendant causes a servant to lose his situation, or prevents his getting one—if he induces a stranger to abstain from going to the plaintiff's shop, or prevents an old customer from continuing to deal there—in each case that will be sufficient special damage. But in all cases such damage must have accrued before action brought; it must be the natural or probable consequence of the defendant's act; it must be specially pleaded in the statement of claim; and it must be proved clearly and with certainty; otherwise the plaintiff will be nonsuited; for there are no general damages to which he can resort.

The plaintiff must also show clearly that the loss is the direct result of the defendant's conduct, and not the consequence of some independent act, some spontaneous resolve, of a third person. As a rule, he can only do this by calling as his witnesses at the trial the persons who ceased to employ him, or who were prevented by the defendant from dealing with him; and they must state in the box their reason for not employing, or not dealing with, the plaintiff. Else it will not be clear that the defendant caused them to do so.

It is not always necessary, however, for the plaintiff to call as his witnesses those who have ceased to deal with him. He may be able to show, by his account-books or otherwise, a general diminution of business, as distinct from the loss of particular known customers or promised orders. He has still to connect that diminution of business with the defendant; but this is sometimes apparent from the nature of the case. Thus, where the defendant has published a statement about the plaintiff's business, which is intended, or which is reasonably likely, to produce, and in the ordinary course of things does produce, a general loss of business,

evidence of such loss of business is admissible, and sufficient to support the action, even though the words are not actionable *per se*, and although no specific evidence was given at the trial of the loss of any particular customer or order by reason of such publication (*Ratcliffe v. Evans*, [1892] 2 Q. B. 524).

*Special Damage when not essential to the Cause of Action.*—Where special damage is not essential to the action, it may still of course be proved at the trial to aggravate the damages, if it has been properly pleaded. The plaintiff must still prove that the special damage alleged is the direct result of the defendant's act. But the law is in this case not quite so strict as to what constitutes special damage, as in cases where it is of the gist of the action. Thus the jury may take into their consideration such consequences as mental distress, illness, expulsion from a religious society, etc., which do not constitute special damage, where it is necessary to the cause of action (per Lord Wensleydale in *Lynch v. Knight*, 1861, 9 H. L. at p. 598).

Again, the plaintiff may in this case allege and prove a general diminution of profits or decline of trade, without naming particular customers or proving why they have ceased to deal with him. If, however, he wishes to rely on the loss of particular customers, he must plead such loss specially, either in addition to, or without, the allegation of a general loss of business; and in that case he must call the customers named as witnesses at the trial. Still, if the customers are not called at the trial, or if for any other reason the proof of the special damage fails, the plaintiff may still fall back on the general damage, and prove a general loss of income induced by the defendant's act (*Evans v. Harris*, 1856, 1 H. & N. 251; 26 L. J. Ex. 31; *Riding v. Smith*, 1876, 1 Ex. D. 91; 45 L. J. Ex. 281). And for this purpose he may give evidence as to the extent and nature of his business before and after the cause of action arose.

Lastly, where it is clear that the action lies without proof of any special damage, any loss or injury which the plaintiff has sustained in consequence of the defendant's words, even after action brought, may be proved to support the legal presumption that damage must necessarily flow from the violation of the plaintiff's right; whereas special damage, in the strict sense of the term, must have arisen before the issue of the writ.

## VII. PROSPECTIVE AND CONTINUING DAMAGES.

It is necessary in the first place to distinguish carefully between a complete cause of action which may yet produce fresh damage in the future, and a continuous cause of action from which continuous damage steadily flows. The plaintiff may be injured in a railway accident, and recover substantial damages from the company, and subsequently disease of the brain or of the spine may develop, which is solely due to the accident. He cannot bring a second action, or claim further damages in the first action. But where the cause of action is a continuing one (as, for instance, an action for a breach of covenant by a master to teach his apprentice, or a breach of covenant to keep premises in repair, or for a continuing trespass) a fresh cause of action arises every day that such breach or injury continues (*Conard v. Gregory*, 1866, L. R. 2 C. P. 153; *Hole v. Charol Union*, [1894] 1 Ch. 293). By Order 36, r. 58, "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment." Should the act or omission complained of be repeated after the assessment, it is open to the plaintiff to bring a fresh action.

But where the act or omission complained of in the action happened once and has not been repeated (e.g. where the defendant has committed

one isolated breach of contract, or has published one libel, or struck the plaintiff one blow) the cause of action is not continuing, and the jury must assess the damages once for all (*Gibbs v. Cruikshank*, 1873, L. R. 8 C. P. 454; *Brunsdon v. Humphrey*, 1884, 14 Q. B. D. 141). No fresh action can, as a rule, be brought for any subsequent damage that may hereafter arise from that act or omission. The jury should therefore take into their consideration, not only the damage that has accrued, but also such damage, if any, as it is reasonably certain will occur in the future. They should compensate the plaintiff for every prospective loss which would naturally result from the defendant's conduct, but not for merely problematical damages that may possibly happen, but probably will not (*Hodsoll v. Stallebrass*, 1840, 11 Ad. & E. 301; *Phillips v. L. and S.-W. Ry. Co.*, 1879, 5 Q. B. D. 78; *Lambkin v. S.-E. Ry. Co.*, 1880, 5 App. Cas. 352).

To this rule there is one (somewhat doubtful) exception, in cases where special damage is essential to the cause of action. In such cases the jury should strictly confine their consideration to such special damage as is specially alleged and proved in the action before them. Hence it would seem to follow that if any fresh damage followed in the future, that would constitute a fresh ground of action, because it was not included in the first. And North, C.J., was of this opinion in *Lord Townshend v. Hughes*, 1676, 2 Mod. Ca. 159. But Lord Holt is reported as saying the contrary in *Fitter v. Veal*, 1701, 12 Mod. Ca. 542; though the *dictum* is not to be found in the other reports of the same case (1 Raym. (Ld.) 339, 692, and 1 Salk. 11, and see Bull. N. P. 7). The question was much discussed in *Darley Main Colliery Co. v. Mitchell*, 1886, 11 App. Cas. 127; and Lord Blackburn unfortunately differed from Lord Bramwell (see pp. 143, 145). But the better opinion now is that a second action will lie for fresh special damage in all cases in which no action lies at all without proof of special damage (see *Crumbie v. Wallsend Local Board*, [1891] 1 Q. B. 503).

#### VIII. REMOTENESS OF DAMAGES.

The special damage alleged must be the natural or the probable result of the defendant's act. The plaintiff may sometimes be able to show that the defendant in fact contemplated and desired such result; in some cases the result is clearly the natural and necessary consequence of his act; in other cases it is so obvious and probable a consequence that it may fairly be said the defendant ought to have contemplated it, whether in fact he did so or not. But where the damage sustained by the plaintiff is neither the necessary nor the probable result of the defendant's conduct, nor such as can be shown to have been in his contemplation at the time, it will be excluded as too remote. Evidence cannot be given at the trial of any special damage which would not flow from the defendant's act in the ordinary course of things, unless there are special circumstances in the case which were known to the defendant, and which rendered that result probable. It is not enough that his act has in fact produced such damage, unless it can reasonably be presumed that the defendant, when he made the contract, or committed the tort, either knew, or ought to have known, that such damage would ensue. And it will be deemed that he ought to have known it, whenever a reasonable man placed as he was, and knowing what he knew and no more, would have recognised that it was a necessary or probable result of such an act.

Thus, if the defendant turns the plaintiff's horses out of their warm stable without any clothing they will probably catch cold, and the defendant will be liable for any depreciation in their value caused by such cold (*M. Mahon*

v. *Field*, 1881, 7 Q. B. D. 591). So if a tenant contrary to his covenant assigns the premises without the consent of the landlord to a person who uses them for a turpentine distillery, and so sets them on fire, the tenant is liable for the damage caused by the fire (*Lepla v. Rogers*, [1893] 1 Q. B. 31). That the plaintiff has become liable to compensate others in consequence of defendant's act is not too remote a consequence to be special damage (*Murray v. Merryweather*, [1895] 2 Q. B. 640). But mere speculative damages cannot be recovered, such as contingent profits which might or might not have been earned by a ship, if it had not been injured (*The Columbus*, 1849, 3 Rob. W. 158, 164, cited with approval L. R. 3 C. P. at p. 507); or damages for the loss of a market at which part of the cargo might have been sold (*The Notting Hill*, 1884, 9 P. D. 105). So no damage can be recovered which rests on a contingency such as the chance that the members of a club might think fit to alter their rules (*Chamberlain v. Boyd*, 1883, 11 Q. B. D. 407). And where, on account of defects in the ship, the voyage had been protracted, and in the meantime the market price of the goods shipped had fallen, it was held that the consignee could not recover damages for loss of market (*The Parana*, 1877, 2 P. D. 118, approved in 9 P. D. 105. But see *Collard v. S.-E. Ry. Co.*, 1861, 7 H. & N. 79; 30 L. J. Ex. 393).

Again, the defendant is never liable for consequential loss, of the possibility of which he was never informed, and which without such information he had no reason to anticipate. The stoppage of a mill is not the natural or necessary consequence of the non-delivery of a portion of its machinery (*Hadley v. Baxendale*, 1854, 9 Ex. Rep. 341; *British Columbia Saw Mill Co. v. Nettleship*, 1868, L. R. 3 C. P. 499).

The damage claimed must be the direct result of the defendant's act. He is not liable for any damage caused by facts or circumstances unconnected with himself, such as the spontaneous action of a third person. The defendant's act must, at all events, be the predominating cause of the alleged damage. But if the defendant by his conduct directly causes or compels a third person to do an act which produces damage to the plaintiff, such damage is not too remote, provided the defendant either did contemplate or ought to have contemplated such a result. The defendant is not responsible for any eccentric or foolish, nor *prima facie* for any negligent or illegal, conduct on the part of a third person. But he is responsible for the ordinary and reasonable consequences of his act; and it may be an ordinary and reasonable consequence of the defendant's act that an innocent third person may do something which injures the plaintiff. Whether the plaintiff has or has not any ground of action against such third party is immaterial. See *Clark v. Chambers*, 1878, 3 Q. B. D. 327, where an innocent third person moved an obstruction which the defendant had illegally placed in a public highway. And where the plaintiff delivered to the defendant a mare to be agisted in a field, and owing to the negligence of the defendant's servant in leaving open a gate, the mare escaped from that field into a cricket field; and certain members of the club thereupon endeavoured in a careful and proper manner to drive her back through the gate; but the mare refused to go through the gate, ran against the wire fence, fell over it, and was injured by one of the iron standards; it was held that the injury to the mare was the natural consequence of the gate having been left open, and that the defendant was liable (*Halestrap v. Gregory*, [1895] 1 Q. B. 561; and see *The Gertor*, 1894, 70 L. T. 703). A collision took place between a steamer and a barque, the steamer being alone to blame; and the steering compass, charts, log, and log glass of the barque were lost or destroyed; the captain of the barque made for a port of

safety, navigating his ship by a compass which he found on board. Owing to the loss of these requisites for navigation, and without any negligence on the part of the captain or crew, the barque, while on her way, grounded, and had to be abandoned. The Court of Appeal held that the grounding of the barque was a natural and reasonable consequence of the collision, and that the owners of the steamer were liable for the damages caused thereby (*The City of Lincoln*, 1889, 15 P. D. 15; and see *Sneesby v. L. and Y. Ry. Co.*, 1875, 1 Q. B. D. 42).

And even where the act of the third person be in itself a tort, still the defendant may, in some cases, be liable for that illegal act, if it was his obvious intention, or the natural result of his conduct, to induce that third person so to act (per Lord Wensleydale in *Lynch v. Knight*, 1861, 9 H. L. at p. 600; and per Littledale, J., in *R. v. Moore*, 1832, 3 Barn. & Adol. 188).

Again, a defendant is not, as a rule, liable for any repetition by another of his tortious act. Thus, in slander, the special damage must be the direct result of the defendant's words, not of some one else's. If A. chooses of his own accord to republish the defendant's words, this is A.'s own act, for the consequences of which he alone is liable. But here again comes in a similar exception. If the republication by A. be the natural or necessary consequence of the defendant's publication to A., or if the defendant intended or desired A. to repeat his words, the defendant is liable for all the consequences of A.'s republication, for he directly caused it. A republication by A. to B. is not, however, considered in England a necessary consequence of the defendant's publication, unless the original communication made to A. places A. under a legal or moral obligation to repeat the slander to B.; e.g. in some cases where A. and B. are husband and wife. And, indeed, if the defendant knew the relation in which A. stood to B. he will be taken to have maliciously contemplated and desired this result when he spoke to A. (see *Derry v. Handley*, 1867, 16 L. T. 263; *Speight v. Gosnay*, 1891, 60 L. J. Q. B. 231).

#### IX. RULES OF PLEADING AS TO DAMAGES.

It is not necessary for a plaintiff to allege in his statement of claim that he has in fact suffered general damage; for the law, as we have seen, presumes that in his favour. But all special damage must be expressly claimed on the pleadings. If the special damage claimed be not set out in the statement of claim with sufficient precision, the defendant is entitled to particulars. But no particulars will be ordered of general damage.

No general rule can be laid down as to the precise degree of exactness necessary in a claim of special damage. "The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry" (per Bowen, L.J., in *Ratcliffe v. Evans*, [1892] 2 Q. B. at pp. 532, 533).

The defendant should never traverse or plead in any way to an allegation of damage in the statement of claim. It will be "deemed to be put in issue in all cases, unless expressly admitted" (Order 21, r. 4). This rule applies whether the damage alleged be essential to the cause of action or not. And see Order 19, r. 17.

**Matter in aggravation or mitigation of damages** should, as a rule, not be set out on the pleadings, unless it involves a serious charge of misconduct against either party, as, for instance, in *Millington v. Loring*, 1880, 6 Q. B. D. 190. And in actions of libel and slander in which the defendant does not justify, he cannot give evidence in chief (though he may cross-examine) with a view to mitigation of damages, as to the circumstances attending publication, or the character of the plaintiff, without the leave of the judge, unless he has seven days at least before the trial furnished particulars to the plaintiff of the matters as to which he intends to give evidence (Order 36, r. 37).

See also AGGRAVATION OF DAMAGES, vol. i. p. 202; INJUNCTION; and MITIGATION OF DAMAGES.

[*Authorities.*—See Mayne on *Damages*, 5th ed.; Sedgwick, *Elements of Damages*, 1896.]

**Damnum absque injuria.**—This maxim and the maxim *injuria sine damno* are treated under the heading INJURIA.

**Dancing House**—A house kept for the purpose of dancing by persons resorting thereto, and to which persons are admitted for money. Such a house falls within the licensing provisions of the Disorderly Houses Act, 1751 (25 Geo. II. c. 36) (*Clarke v. Searle*, 1793, 1 Esp. 25). See BROTHEL; MUSIC AND DANCING LICENCES; PUBLIC ENTERTAINMENTS.

**Dangerous Animals.**—A person who keeps a dangerous animal does so at his peril. The law on the subject was concisely stated by Lord Denman, C.J., in *May v. Burdett*, 1846, 9 Q. B. 101 (an action for injuries caused by the bite of a monkey), where he said: "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the *keeping* the animal after *knowledge* of its mischievous propensities" (see also *Filburn v. People's Palace*, 1890, 25 Q. B. D. 258, and ANIMALS).

**Dangerous Goods.**—Gunpowder can be manufactured only in duly-authorized factories (Explosives Act, 1875, s. 4). To manufacture it elsewhere exposes the manufacturer to severe penalties. It can only be kept (except for private use) in authorised stores, for the licensing of which, as well as of factories, provision is made by the Act, which also contains extensive regulations to be observed in such factories, etc. Retail dealers in gunpowder are registered by local authorities, and regulations are made respecting the storage of the explosive on their premises. For the conveyance of gunpowder by sea, railway, canal, and road by-laws are to be made. Somewhat similar provisions are contained in the statute with respect to explosives other than gunpowder. Government factories, etc., are exempt from this Act. See EXPLOSIVES.

For the manufacture, storage, sale, and conveyance of petroleum,\*

regulations are made by the Petroleum Acts, 1871 and 1879, and the Petroleum (Hawkers) Act, 1881. See PETROLEUM.

Railway companies are not bound to carry goods which in their opinion are dangerous, and penalties are imposed on persons bringing any such material upon the railway without duly notifying the company of its nature (Railways Clauses Act, 1845, s. 105).

A similar provision to that just mentioned is contained in the Tramways Act, 1870, s. 53.

By the Merchant Shipping Act, 1894, dangerous goods (which term is defined as meaning aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitro-glycerine, petroleum, explosives within the Explosives Act, 1875, and any other goods which are of a dangerous nature) are not to be carried by any vessel, unless their nature and other particulars are distinctly marked on the outside of the package containing them. Penalties are imposed on persons contravening this provision, or for misdescribing goods (ss. 446-450).

**Dangerous Machinery.**—By the various Factory and Workshop Acts provision has been made with regard to the use of dangerous machinery in factories and workshops. Sec. 5 of the Act of 1878 (as amended by the later Acts of 1891 and 1895) requires all dangerous parts of machinery and every part of mill gearing to be securely fenced, or to be in such a position as to be equally safe to employees as if it were so fenced; and the fencing must be constantly maintained in an efficient state while the machinery is in motion. By the same Acts restrictions are placed upon the cleaning of machinery while in motion by children, young persons, or women. Power is given to Courts of summary jurisdiction on a complaint by a factory inspector, and on being satisfied that any machinery used in a factory or workshop is in such a condition as to be dangerous to life or limb, to make orders prohibiting the use of such a machine until it is so altered or repaired as to be no longer dangerous; an interim order may be made in urgent cases, on an *ex parte* complaint by the inspector, prohibiting the use of such machinery until the complaint can be heard and determined (Act of 1895, s. 4). Penalties are provided for any contraventions of the Act with respect to the use of dangerous machinery (see Redgrave, *Factory Acts*, 6th ed.). See FACTORIES AND WORKSHOPS.

**Dangerous Performance.**—By the Children's Dangerous Performances Act, 1879, and the Children's Dangerous Performances Act, 1897, which came into operation on 6th August 1897, the employment of any child under the age of fourteen, or of any male young person under the age of sixteen, or female young person under the age of eighteen, in any public exhibition or performance whereby, in the opinion of a Court of summary jurisdiction, the life or limbs of such persons are endangered, is forbidden; and the employer, and the parent, guardian, or person having the custody of such child or young person contravening the provisions of the Act are liable on summary conviction for each offence to a penalty not exceeding £10. The employer, moreover, is liable, in the event of an accident to such child or young person, causing actual bodily harm, in the course of a public exhibition or performance, to be indicted for assault, and he may also be ordered to pay compensation not exceeding £20, in respect of such an accident. Whenever, in a prosecution for an offence committed

against the Act (which cannot be instituted, except in the case of an accident causing actual bodily harm to a child or young person, without the consent in writing of the chief officer of police of the police area in which the offence was committed: Act of 1897, s. 2), it appears to the Court that the child in question is apparently of the age alleged by the informant, the *onus* of showing that the child is not of that age is upon the person charged.

**Dangerous Structure.**—The provisions of the Towns Improvement Clauses Act, 1847, with respect to ruinous or dangerous buildings, are incorporated by the Public Health Act, 1875; these provisions enable the surveyor of the local authority to take steps to have such buildings taken down or so secured as to be no longer dangerous. Sec. 75 of the Act of 1847 enables the surveyor, if he deems any building or wall, or anything affixed thereon, to be in a ruinous state and dangerous to passengers or to the occupiers of adjoining buildings, to cause a proper hoarding or fence to be put up for the protection of passengers; and he can call upon the owner to take down, secure, or repair such building or wall, or other thing, as the case shall require. If the owner fails to comply with this notice by beginning to take down, repair, or secure the same within three days from the service of notice upon him, the surveyor may make complaint thereof before two justices, who may order the owner, or in his default the occupier (if any), to comply with the requirements of the surveyor within a specified time; and in case of default being made, the local authority may do the work, and may levy for the expenses by distress (s. 76); or if the owner cannot be found, or distress cannot be made, the local authority may take the house and ground, etc., and after deducting their expenses, restore any surplus to the owner (ss. 77, 78). By the same statute (ss. 79, 80), provision is made for the erection of hoardings and otherwise providing for the safety of the public during repairs to buildings.

Provision is also made by the London Building Act, 1894 (ss. 102–117), with respect to dangerous and neglected structures within the metropolis. The owners of such structures as are alleged to be dangerous may, if they dispute the necessity of any of the requisitions served upon them by the London County Council (or the Commissioners of Sewers, if the building in question is within the limits of the city), by notice in writing require the matter to be referred to arbitration. Notwithstanding this provision, if it is shown to the satisfaction of a petty sessional Court that the structure is in such a condition as to require immediate treatment, the Court may make such order as it thinks fit with respect to the taking down, repairing, or otherwise securing the structure. In other respects the provisions in this Act are practically identical with those in the Towns Improvement Clauses Act, 1847, set out above.

**Day.**—In *Cq. Litt.*, p. 135 *b*, the legal meaning of “day” is defined as “the day of appearance of the parties or continuance of the plea,” and a broad distinction is there drawn between the *dies naturalis* of twenty-four hours and the *dies artificialis*, counting from sunrise to sunset.

Under the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 36 (2)), “where an Act passed after the commencement of this Act, or any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or by-laws made, granted, or issued under a power conferred by any such Act, is expressed to come into operation on a particular day, the same shall be



construed as coming into operation on the expiration of the previous day." (See also *Williams v. Nash*, 1859, 28 L. J. Ch. 886.) *Semble*, the rule laid down in the Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 9), would apply to the duration of the natural day.

The *dies naturalis*, therefore, may be defined as the space of time between 12 p.m. and 12 p.m. by Greenwich mean time in Great Britain, and by Dublin mean time in Ireland.

The expression *dies artificialis* may be regarded as a convenient term to signify all the various kinds of "day" known in legal proceedings, other than the natural day.

*In the Law of Distress.*—In the law of distress, "day" means the period between sunrise and sunset. In *Tutton v. Darke*, 1860, 2 L. T. 361, it was doubted whether for such a purpose the time of sunrise was to be reckoned from the first appearance of the beams of the sun above the horizon, or from the time when the entire sun had emerged. The judgment in that case, therefore, leaves it doubtful whether the almanac is to be accepted as determining the time of sunrise or sunset. It seems, however, that the time of the clock (see Statutes (Definition of Time) Act, 1880, *supra*), coupled with the almanac, will be some evidence, and if unanswered, sufficient as to the time of sunrise or sunset (see Oldham and Foster, *Law of Distress*, p. 184, and cases there cited).

As to *Burglary*, see article BURGLARY, vol. ii. p. 308.

*In Computing a Term of Imprisonment.*—It has been held that for the purpose of computing a term of imprisonment, the natural day must be considered as not divisible. The hour at which the prisoner is first imprisoned is not to be taken into consideration; but the imprisonment is to be taken as relating back to the first moment of the natural day on which it commences, and the prisoner is entitled to be released at midnight of the last day of the term for which he is sentenced (*Migotti v. Colville*, 1879, 4 C. P. D. 233). See more fully MONTH and TIME.

*In Relation to Personal Service.*—In the case of service of a writ of summons commencing an action, and any other document which is specifically ordered to be served in the same manner as a writ, the term "day" means the natural day, because such writ or document may be served at any time of the day or night, except on Sunday (*q.v.*), which is expressly excluded by the Sunday Observance Act, 1677 (29 Car. II. c. 7). No instrument in Admiralty, except a warrant, may be served on a Sunday, Good Friday, or Christmas Day. The fact of a writ of summons being specially indorsed with a statement of claim does not prevent its being properly served at any hour of the day or night (*Murray v. Stephenson*, 1887, 19 Q. B. D. 60). See SERVICE AND DELIVERY.

*In Relation to Service other than Personal.*—In respect of proceedings in the High Court, including bankruptcy, the day terminates at 6 p.m. on all week-days except Saturday, and on Saturday at 2 p.m. Documents served after 6 p.m. on any day except Saturday are presumed to have been served on the next day, and if served after 2 p.m. on Saturday are taken as served on the following Monday (see Rules of the Supreme Court, Order 64, r. 11, and Order 67, r. 2; Bankruptcy Rules, 1886, r. 90).

As to rules for computing a given number of days, and the meaning of certain expressions, such as "clear days," "days at least," "running days," etc., see CLEAR DAYS; TIME.

**Day Industrial School.**—See INDUSTRIAL SCHOOLS.

**Deacon** (*διάκονος*) in ecclesiastical law signifies a member of the third order in the clergy in the Christian Church. In the service of the Church of England for the ordering of deacons it is stated that "it appertaineth to the office of a deacon in the Church, when he shall be appointed to serve, to assist the priest in divine service, and specially when he ministereth the holy communion, and to help in the distribution thereof, and to read Holy Scriptures and homilies in the Church; and to instruct the youth in the catechism; and in the absence of the priest, to baptize infants, and to preach, if he be admitted thereto by the bishop. And, furthermore, it is his office, when provision is so made, to search for the sick poor and impotent persons of the parish, to intimate their estates, names, and places where they dwell unto the curate" (which here means the rector or vicar having cure of souls in the parish), "that by his exhortation they may be relieved by the alms of the parishioners or others." It has been considered that as a deacon may baptize, etc., so he may by parity of reason bury the dead and perform the marriage service (but this last point is very doubtful; see article MARRIAGE). A deacon, however, generally may perform all such offices in the liturgy as a priest may do, except to consecrate the holy communion or pronounce the absolution.

No person can be admitted by a bishop to the office of a deacon except he is twenty-three years old, unless he have a faculty (Preface to the Ordination Service, Canon 34 of the Canons of 1603, and 44 Geo. III. c. 43), and such faculty, it would appear, must be obtained from the Archbishop of Canterbury.

For the form of ordination for deacons in the Church of England, see Prayer-Book. For the origin and history of the form, see Blunt's *Annotated Book of Common Prayer*, pp. 544-554.

The ordination of deacons is only to take place on the Sundays following Ember weeks, "in the cathedral or parish church where the bishop resideth, and in the time of divine service, in the presence, not only of the archdeacon, but of the dean and two prebendaries at the least, or (if they shall happen by any lawful cause to be let or hindered) in the presence of four other grave persons, being masters of arts at the least, and allowed for public preachers" (see Canon 31 of the Canons of 1603). In practice, however, it is considered, having regard to the words of the rubric in the office of ordination, that the presence of two priests is sufficient.

A deacon must (except for reasonable cause it shall otherwise seem good to the bishop) continue in that office for a year. A deacon cannot hold a benefice or sit in convocation. (See HOLY ORDERS.)

[*Authorities*.—Bingham, *Antiquities of the Christian Church*; Watson, *Clergyman's Law*; Gibs. *Col.*; Phillimore, *Eccl. Law*, 2nd ed.; Blunt, *Annotated Book of Common Prayer*.]

**Dead Animal**.—1. The ownership of a domestic animal is not divested by its death, and the owner can maintain his rights against persons appropriating the carcass by action of trover, or by indictment for larceny, even, it would seem, when the animal is dead and buried (*R. v. Edwards*, 1877, 13 Cox C. C. 384). In indictments it is necessary to state who is the owner, and usual to state that the animal alleged to have been stolen is dead (*R. v. Edwards*, 1823, Russ. & R. 497; *R. v. Williams*, 1825, 1 Moo. C. C. 107; *R. v. Holloway*, 1823, 1 Car. & P. 127n). But since the case of *R. v. Puckeridge*, 1829, 1 Moo. C. C. 242, and 14 & 15 Vict. c. 100, ss. 11, 24, 25, this particularity seems needless in the case of animals which,

while living, were the subject of property, unless the penalties for stealing the live and the dead animal are different, or arise under different enactments. But the animal must be described in an unambiguous manner (*R. v. Lonsdale*, 1864, 4 F. & F. 56). In the case of certain animals like dogs, the animal, at common law, while living was not the subject of larceny; but its skin and dead carcass was (see *R. v. Edwards*, 1823, 1 Car. & P. 127n).

2. In the case of animals which are *feræ naturæ* and fit for food or game, while the living animal is not the subject of property until reclaimed, or in captivity, or reduced into possession, on being killed it becomes the property of the person on whose land it is killed, and he has a civil remedy against the person who takes it away (*Sutton v. Moody*, 1690, 1 Raym. (Ld.), 250).

3. Game when killed becomes the subject of larceny if the taking is a distinct and independent act from the killing (*R. v. Edwards*, 1823, R. & R. 497; *Lord Lonsdale v. Rigg*, 1857, 1 H. & N. 923; *Blades v. Higgs*, 1865, 11 H. L. 621; *R. v. Towneley*, 1871, L. R. 1 C. C. R. 315; *R. v. Roe*, 1870, 11 Cox C. C. 554; *R. v. Read*, 1877, 14 Cox C. C. 17; *R. v. Petch*, 1878, 14 Cox C. C. 116; Russ. on *Crimes*, 6th ed., vol. ii. p. 247; Oke, *Game Laws*, 4th ed., 17; and see also GAME LAWS). In indictments for this form of larceny it is essential to describe the animal as dead (*R. v. Roe*, 1870, 11 Cox C. C. 554). Animals *feræ naturæ*, but regarded of a base nature, have been said not to be the subject of property whether living or dead; but the carcass of any dead animal which has become the property of anyone is now dealt with as the subject of larceny (see 24 & 25 Vict. c. 96, ss. 11, 21; Oke, *Game Laws*, 4th ed., 20).

4. The common law duty of owners and occupiers of land not to allow a public nuisance to exist upon it extends to nuisances caused by the dead bodies of animals irrespective of any question of ownership of the animals (*A.-G. v. Tod-Heatley*, [1897] 1 Ch. 560); but such nuisances can also be dealt with summarily under the Public Health Acts. Where an animal lies dead on a highway, the sanitary authority and road authority are primarily concerned to have it removed; but this apparently does not preclude them from calling on the owner to remove it or from charging him with the cost of abating the nuisance or removing the obstruction caused by the carcass.

5. As to animals, alive or dead, unfit for human food, see ANIMALS; UNSOUND FOOD.

**Dead Pledge.**—This was the ancient *mortuum radium*, a species of mortgage by which the mortgagor's land was transferred to the mortgagee to be held by him until the principal money was repaid. The mortgagee had not to account for the rents and profits, in this respect a *mortuum radium* differed from a *vivum radium*. See MORTGAGE.

**Dead Rent.**—A term sometimes used in mining leases, in contradistinction to a royalty, to denote a fixed rent payable whether the mine is productive or not.

**Deaf and Dumb Persons, Presumption as to.**—Persons who are both deaf and dumb are in law presumed to be idiots (*Co. Litt.* 42, b). But the presumption may be rebutted (cp. *Elyot's case*,

18 Car. II. Curt. 53; *Ruston's case*, 1786, Leach, 408; *Dickenson v. Blisset*, 1754, 1 Dink. 268).

*Civil Capacity of.*—The marriage of deaf and dumb persons is valid if they understand the nature of the contract they are entering into (*ibid.*), and there is no undue influence. *Harrod v. Harrod*, 1854, 1 Kay & J. 14, 16, is an illustration of this. There Page-Wood, V.C., upheld the marriage of a deaf and dumb woman who had never been taught to talk with her fingers, could not read or write, could only be made to understand anything by persons who had a long and intimate acquaintance with her, and did not know the value of money, on the ground that her conduct before and after marriage showed that she knew the nature of the contract into which she had entered.

A deaf and dumb person is a competent witness, and may be examined through an interpreter, if he is capable of conversing by signs, and understands the nature and obligation of an oath (*Ruston's case*, *supra*).

*Criminal Responsibility.*—The criminal responsibility of deaf and dumb persons is governed by the same principles as that of the insane, and will be discussed in the article LUNACY. As to the arraignment of such persons, see ARRAIGNMENT, vol. i. p. 327; BAR, PLEA IN, vol. ii. p. 9.

*Education of Blind and Deaf Children.*—Provision has been made for the education of blind and deaf children by the Elementary Education (Blind and Deaf Children) Act, 1893 (56 & 57 Vict. c. 42), which is to be read (see s. 18) with the Elementary Education Acts of 1870 to 1891. The following is a brief summary of its provisions:—

Efficient elementary instruction (see EDUCATION) is in the case of a blind or deaf child to include instruction suitable to its condition, and the fact of a child (not under seven years of age) being blind or deaf (s. 1 (1)) or (s.1 (2)) that there is not within any particular distance from the residence of such child any public elementary school, is not of itself a sufficient reason for the neglect of the parent to provide it with "efficient elementary instruction." It is the duty of school authorities to enable deaf and blind children to receive education in schools certified by the Education Department by establishing or maintaining such schools (s. 2 (1)). The duty of the school authority under this section does not, however, extend to children who are (a) idiots or imbeciles, or (b) resident in a workhouse or in any institution to which they have been sent by a board of guardians from a workhouse; or (c) boarded out by guardians. As to contribution by one authority to school of another, see ss. 2 (3), 3. As to powers and expenses of school authority, see s. 5. A school authority for the purposes of the Act, is (a) for an area under a school board—the school board; (b) for other areas, the district council, acting through a school attendance committee, and till such council is established, the board of guardians or borough council or urban sanitary authority, appointing a school attendance committee for the area acting through that committee (s. 4). In case of failure of duty under the Act the Education Department may either (1) proceed under sec. 27 of the Elementary Education Act, 1876, or (2) order that the school authority pay to any certified school specified in the order towards the expenses of any particular child at the school such annual or other sum as may be charged by order of the Department (s. 6). A school is not to be certified (a) if it is conducted for private profit, nor (b) unless it is either managed by a school authority or at least one-third of its annual expenses of maintenance are defrayed out of sources other than local rates (with which parents' fees are merged) or moneys provided by Parliament, and its expenses are audited and published in accordance with

regulations of the Education Department, nor (c) unless it is open at all times to inspection of H.M. inspectors of schools or the visitors of any school authority sending children to the school, nor (d) unless the requirements of the Act are complied with (s. 7 (1)). Every school so certified is a "certified efficient school" within the meaning of the Elementary Education Act, 1876 (*ibid.* (2)). The certificate is annual (*ibid.* (3)). As to religious instruction of deaf and blind children, see s. 8. As to the liability of parent for expenses, see s. 9. There are savings of parental franchises (s. 10 (1)), and right of selecting any particular certified school (*ibid.* (2)). A deaf or blind boy or girl is to be deemed a child till the age of sixteen (s. 11). Public grants may be made to certified schools by the Education Department (s. 12). The Education Department reports annually to Parliament under this Act (s. 14). See these reports for lists of certified schools; and also Elementary Education Act, 1897.

[*Authorities.*—Russ. on *Crimes*, 6th ed.; Shelford, *Lunacy*, 2nd ed.; Pope, *Lunacy*, 2nd ed.; Wood Renton on *Lunacy*; Chitty, *Statutes*; *s.v. Education*.]

**Dealing.**—"I take it that the strict definition of 'dealing' is 'distributing.' A dealer is one who distributes" (per Alderson, B., in *Allen v. Sharp*, 1848, 17 L. J. Ex. 212).

Where the plaintiffs conveyed coal for use on their line from various collieries within the borough of K., where it was wanted for their own consumption, this was held to be a "dealing" with coal, so as to compel the plaintiffs to pay a tonnage rate, under the Kingston-upon-Hull Improvement Act, 1854 (*North-Eastern Ry. Co. v. Kingston-upon-Hull*, 1891, 55 J. P. 518).

As to a "dealing for valuable consideration" within the meaning of sec. 49 of the Bankruptcy Act, 1883, see *In re Seaman, Ex parte Furness Finance Co.*, 1896, 65 L. J. Q. B. 348.

**Dean and Chapter.**—In every diocese in England, except those of the recently founded Sees of St. Alban's, Liverpool, Newcastle, Southwell, and Wakefield, there is attached to the cathedral church an incorporate body of clergy known as the dean and chapter, consisting of a dean as head and a varying number of members styled canons or, in some cases, prebendaries. These cathedral foundations are of two classes, technically known as old and new. The old foundations are the cathedral chapters which were, before the dissolution of the monasteries, composed of secular clergy. They are thirteen in number, namely—York, St. Paul's, Lincoln, Lichfield, Hereford, Wells, Salisbury, Exeter, Chichester, St. David's, Llandaff, Bangor, and St. Asaph. The new foundations are those cathedral churches which were served by regular clergy before the dissolution of the monasteries, and in which the dean and chapter took the place of the prior and convent. They were originally thirteen in number, namely—Canterbury, Durham, Winchester, Carlisle, Ely, Norwich, Rochester, Worcester, Bristol, Gloucester, Peterborough, Chester, and Christ Church, Oxford. To these may be added, of recent foundation, the former collegiate churches of Ripon and Manchester, which attained cathedral rank upon the erection of those Sees under the Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. iv. c. 77), and the cathedral church of Truro, founded under the Truro Chapter Act, 1878 (41 & 42 Vict. c. 44), amended by 50 & 51 Vict. c. 12.

Provision has been made for the foundation of chapters at Newcastle and Liverpool. See Newcastle Chapter Act, 1884 (47 & 48 Vict. c. 33), and Liverpool Cathedral Act, 1885 (48 & 49 Vict. c. li. [local]). In addition to the cathedral foundations there are the two collegiate chapters of Westminster and Windsor. Westminster for a few years (1541–1550) after the dissolution of the Benedictine abbey was a cathedral church, and its present collegiate character dates from a charter of Elizabeth, anno 1560. Windsor was erected into a collegiate chapter by charter of Edward III. in 1348. The rationale of a diocesan chapter is that there should be some select body of priests to act as the bishop's council, as well as to be responsible for the fabric and services of the cathedral church. Thus, a lease by a bishop of lands belonging to the See required at common law, and a grant by the bishop of a freehold office, such as that of official principal (*q.v.*), still requires, confirmation by the chapter to be binding on the bishop's successors. The main differences of constitution between the old and new foundations are as follows:—The old foundations consist of a dean and a large body of canons or prebendaries, of whom a small number are called into residence, or, in modern language, are appointed canons-residentiary. Excepting the cases of the three Crown canonries at St. Paul's, the residentiaries are now selected by the bishop. The non-residentiary canons or prebendaries are collated to their prebends by the bishop. They have for certain purposes (see *R. v. Dean and Chapter of Hereford*, 1870, L. R. 5 Q. B. 196) a voice in the chapter, and are said to be members of the greater or general chapter. See *Randolph v. Milman*, 1868, L. R. 4 C. P. 107, as to their right to vote at the election of proctors for the chapter in convocation (*q.v.*) and *semble* at a bishop's election also. The deans of the old foundation were formerly elected by the chapter under the licence of the bishop, not of the Crown as wrongly stated by Coke, Hargrave, and several succeeding writers (see *R. v. Chapter of Exeter*, 1840, 12 Ad. & E. 512); but now by the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113, s. 24), the old foundation deaneries are in the direct patronage of the Crown, except the four Welsh deaneries, which are in the gift of the respective bishops. See the Welsh Cathedrals Act, 1843 (6 & 7 Vict. c. 77); see also WALES.

Besides the deanery, the three ancient dignities of precentor, chancellor of the church (or choir), and treasurer are invariably found in the old foundations. The clerical members of the choral body are usually called priest-vicars or vicars-choral, the title minor canon being only found at St. Paul's and Hereford. In most of the old foundations they are members of a college separately incorporated, in some cases together with the lay-vicars (see ECCLESIASTICAL CORPORATIONS).

The new foundations consist of a dean appointed by the Crown, and a small body of canons (usually styled prebendaries before the 3 & 4 Vict. c. 113) appointed by the Crown, the Lord Chancellor, or the bishop. In these churches, as also in the cathedral churches without chapters (*vide supra*), the bishop is entitled to appoint not more than twenty-four honorary canons who have, however, no "place in the chapter." But at elections of commissioners under the Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54, s. 4), and of assessors under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32, ss. 3 and 12), the honorary canons vote, and are described in the latter Act as "members of the cathedral church."

In all the new foundations the clerical members of the choral body are styled minor canons (except at Christ Church, Oxford, where the title of

chaplain obtains), and one of them is precentor; but they are merely statutable officers, having no corporate capacity apart from the chapter.

Under 3 & 4 Vict. c. 113, several canonries are annexed to archdeaconries. Five canonries at Christ Church, two at Ely, two at Durham, and one at Rochester, are annexed to university professorships. See 3 & 4 Vict. c. 113, ss. 5-7, 12, 15, and 40 & 41 Vict. c. 48, ss. 25, 27.

By 12 Anne, c. 6, s. 7, a prebend (now canonry) of Norwich is annexed to the mastership of Catherine Hall (now St. Catherine's College), Cambridge; and a prebend (now canonry) of Gloucester to the mastership of Pembroke College, Oxford.

By 3 & 4 Vict. c. 113, s. 29, the rectories of St. Margaret's and St. John's, Westminster, are respectively annexed to two canonries of Westminster. By sec. 27 of the same Act, "no person shall be capable of receiving the appointment of dean, archdeacon, or canon, until he shall have been six years complete in priest's orders, except in the case of a canonry annexed to any professorship, headship, or other office in any university."

The bishop of the diocese is the visitor of all cathedral chapters (except Christ Church, Oxford, of which the Crown is visitor), in the old foundations *jure ordinario*, and in the new under the founder's statutes, as to which see 6 Anne, c. 75. The bishop as visitor of the dean and chapter cannot order any alteration in the fabric of a cathedral church, except on some definite legal ground, nor is such fabric subject to the general ecclesiastical law requiring a faculty (*Phillpotts v. Boyd*, 1875, L. R. 6 P. C. 435). The Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85, s. 17), provides for complaints against a dean and chapter in the case of a cathedral or collegiate church. As to the visitor's discretion under that Act, see *R. v. Bishop of London* (*Allcroft and Lighton's cases*), [1891] App. Cas. 666. At common and canon law, the dean and chapter are the guardians of the spiritualities of the bishopric, *sede vacanti*. But, excepting the cases of the two metropolitan Sees of Canterbury and York and the See of Durham (as to which see *Dean and Chapter of Durham v. Archbishop of York*, 1672, 1 Vent. 225, 234), this right appears to have been lost by composition or prescription, and to have become vested in the metropolitan.

It is sometimes said that the deanery being vacant, the corporation is incomplete, and it would seem that the chapter cannot (without a dean) accept a grant of lands or part with their capitular estates (*Lyn v. Wyn*, 14 Car. II. Bridg. O. 148). But it is conceived that for acts necessary to the purposes of the corporation, e.g. the election of a bishop under a *congé d'élire* (q.v.), the chapter could, and properly should, act without waiting for the deanery to be filled. Otherwise, in the case of Truro, where the bishop is at present dean (as was formerly the case at St. David's and Llandaff), there could be no valid election. See 4 & 5 Vict. c. 39, s. 16.

Several ancient and modern canons bear on the duties of deans and members of chapters, in particular, Canons 24, 25, 31, 35, 42, 43, 44, 51, 74, and 122, of 1603, all of which are binding on the clergy in spirituals. For instance, the authority of Canon 24, prescribing, *inter alia*, the use of "a decent cope" in cathedral and collegiate churches upon "principal feast days" at the holy communion, was recognised in *Hebbert v. Purchas*, 1871, L. R. 3 P. C. 606, at p. 649.

As to alienation and leasing of capitular estates, see ECCLESIASTICAL COMMISSIONERS. For the law regulating capitular patronage, see PATRON.

As to resignation of deans, canons, and minor canons of cathedral or

collegiate churches, see Deans and Canons Resignation Act, 1872 (35 & 36 Vict. c. 8).

[*Authorities*.—Godolphin, *Rep. Can.* 51; Ayliffe, *Parergon*, 199; Gibs. *Codex*, i. 169, ii. 1446; Stephens, *Laws relating to Clergy*, i. 403; Grant on *Corporations*, 581; Phillimore, *Ecc. Law*, 2nd ed., i. 122; Cripps, *Church Law*, 6th ed., 98; E. A. Freeman, "Case of Deanery of Exeter," *Law Quarterly Review*, iii. 280.]

**Dean Forest**—The forest of Dean, an ancient Royal forest, in the county of Gloucester. For the history of the forest, see Nicholls' *Forest of Dean: an Historical and Descriptive Account* (London, 1858). As to the general forest law, see under title FOREST; and as to the special legislation for the mineral rights in this forest, see under title MINES AND MINERALS.

The Crown is owner of the soil and freehold of some 19,200 acres. It is also the owner of the minerals within the whole of the forest, and, with some exceptions, of the minerals outside the forest, but within the hundred of St. Briavels.

The management of forest of Dean is vested in the Commissioners of Woods, etc., by 10 Geo. IV. c. 50, and the Commissioner to whom the forest is specially assigned is also gaveller of the forest.

With regard to lands in the forest, the soil and freehold of which is vested in Her Majesty, discharged of all common and other rights of the subject, and not being land for the time being enclosed under the authority of any Act or Acts for the growth of timber, the general leasing powers of 10 Geo. IV. c. 50 apply (see CROWN LANDS), 18 Vict. c. 16.

*Right of Enclosure*.—The Crown has the right to have 11,000 acres of the waste lands under enclosure for the growth of timber, and such enclosures remain in severalty in the actual possession of the Crown, freed and discharged from all rights of common and other rights whatsoever, whilst they remain so enclosed. When the trees in any enclosure are past danger from cattle, the enclosure or any part thereof may be laid open in common, and a like quantity of open waste enclosed in lieu thereof. The enclosures are made and set out by commissioners acting under a commission issued by the Crown (19 & 20 Car. II. c. 8, and 48 Geo. III. c. 82).

*Rights of common* over the open and unenclosed waste are exercisable by persons entitled thereto, namely, pannage after Michaelmas and common of pasture except during the fence months, that is, for fifteen days before and fifteen days after Midsummer day (old style), and during the winter Heyning, which is from the 10th November to the 23rd of April (old style); under and subject to the forest law. Sheep are not commonable animals in a forest. No holder of land within the forest can legally claim a right of common, and the only persons who could claim such a right are the inhabitants of certain parishes bounding upon the forest (see Fifth Report of Dean Forest Commissioners, dated 25th August 1835).

*Leasing and Selling of Waste Lands*.—The Crown is empowered to lease any part of the waste lands to be used in connection with mines or quarries for terms not exceeding thirty-one years. The quantity to be held with any one coal or iron mine is not to exceed six acres, and with a quarry, one and a half acres (s. 6, 24 & 25 Vict. c. 40). Any transfer of such a lease must be registered in the books of the gaveller. Licences may also be granted over the open waste and over the enclosed lands of Her Majesty, as well as under mines or workings comprised in existing gales



for making shafts, roads, or railways, or for any other easements or conveniences for the better working of mines (s. 65, 1 & 2 Vict. c. 43; and s. 15, 24 & 25 Vict. c. 40). Power is also given to sell or exchange lands unsuited for the growth of timber, and intermixed with contiguous private lands or waste, or other lands not exceeding £1000 in value in any one instance.

*Encroachments.*—The Dean Forest Commissioners of 1831 were directed to inquire into all encroachments then existing in the forest, and they made their report on the 25th August 1835, accompanied by schedules and plans. The persons in possession of encroachments coloured red and green on those plans were quieted in their possession, and the persons holding lands coloured blue and yellow were enabled to lease or purchase them on specified terms (1 & 2 Vict. c. 42).

No length of possession of an encroachment made since the Act can give a title as against the Crown (s. 6, 20 Car. II. c. 8). All encroachments or trespasses are to be inquired into by any two or more verderers of the forest, either at a Court of attachment or not. The verderers have power to convict and fine and to order encroachments to be abated (1 & 2 Vict. c. 42, s. 15, and 24 & 25 Vict. c. 40, s. 25). As to verderers and Court of attachments generally, see FOREST.

## Death Duties.

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The expression "Death Duties" employed in the Finance Act, 1894, s. 13, is now used as the most compendious term for describing the taxation levied on the estates of deceased persons, or on the persons to whom benefits accrue by their death. It comprises the following duties:—(1) PROBATE DUTY; (2) ACCOUNT DUTY; (3) LEGACY DUTY; (4) SUCCESSION DUTY; (5) ESTATE DUTY. All these taxes have the one point in common, that they are levied in respect of the transmission or devolution of property on death.

### PROBATE DUTY.

Probate duty is a stamp duty leviable, as the price of obtaining probate or letters of administration, on the net value of all personal property, or property, so regarded for the purpose of taxation, of which a deceased person was competent to dispose (including property appointed by a will under a general power) (23 & 24 Vict. c. 15; *Lord Advocate v. Bogie*, [1894] App. Cas. 83; *A.-G. v. Loyd*, [1895] 1 Q. B. 496), and which was within the jurisdiction of the Probate Division of the High Court in England, and would vest in his executor or administrator, on obtaining the grant of probate or administration. It was first created in 1694, and from 1815 to 1894 was levied under the Acts, 55 Geo. III. c. 184, 43 Vict. c. 14, and 44 Vict. c. 12 (Hanson, *Death Duties*, 4th ed., 10). With respect to duties arising on deaths since August 1, 1894, probate duty is not payable where estate duty (*q.v.*) is payable and paid. It was collected until 1881 (44 Vict. c. 12) by a stamp denoting the amount paid, and impressed on the probate or letters of administration before issue to the person seeking representation, and since 1881 has been collected by a stamp impressed on the inland revenue affidavit of the effects with respect

to which it is granted. It is only levied on first, and not on second or subsequent grants of probate or administration (41 Geo. III. c. 86, s. 3 (E. S.); 5 & 6 Vict. c. 82, s. 36 (1.)). It is payable by the executor, who must, under penalty, take out probate within six months of the death. It also falls on all persons taking possession of or administering the property, including an executor *de son tort* (55 Geo. III. c. 184, s. 37; 44 & 45 Vict. c. 12, s. 40), but not a joint stock company which, at the request of foreign executors who have not obtained probate, transfer shares of the deceased on their register to the executors (*A.-G. v. New York Breweries Co.*, [1897] 1 Q. B. 738).

*Scale of Duty.*—There are three unrepealed scales of probate duty—

1. That of 1815, 55 Geo. III. c. 184, sched. Part III., as modified with respect to estates of £1,000,000 and upwards (22 & 23 Vict. c. 36, s. 1), which applies in the case of grants made prior to April 1, 1880.

2. That of 1880 (43 Vict. c. 14), which applies to grants made after March 31, 1880, and before June 1, 1881.

3. That of 1881, which applies to grants made after May 31, 1881, and before August 2, 1894, and is—

Up to £100 net (27 & 28 Vict. c. 56, s. 5; 44 Vict. c. 12, ss. 27, 28).		nil.
Up to £300 (including personal estate abroad)	£1	10 0
Over £300 and not exceeding £350	7	0 0
"    350                    "    400	8	0 0
"    400                    "    450	9	0 0
"    450                    "    500	10	0 0
"    500                    "    550	13	15 0
"    550                    "    600	15	0 0
"    600                    "    650	16	5 0
"    650                    "    700	17	10 0
"    700                    "    750	18	15 0
"    750                    "    800	20	0 0
"    800                    "    850	21	5 0
"    850                    "    900	22	10 0
"    900                    "    950	23	15 0
"    950                    "    1000	25	0 0

and over 1000 at 3 per cent. for every £100 or fraction of £100.

These scales, while superseded as to deaths since August 1, 1894, by the estate duty, must still be used in rectifying the stamp on probates, etc., granted with respect to deaths on or before that date (see Hanson, 4th ed., 347, 354).

The taxable property includes all personalty (*bona notabilia*) in the United Kingdom, including negotiable instruments and even foreign negotiable securities (*Stern v. R.*, [1896] 1 Q. B. 211), and certain Indian securities (23 & 24 Vict. c. 5) and shares registered on the Colonial Register of a British company, if the owner is domiciled in the United Kingdom (46 & 47 Vict. c. 30; 52 & 53 Vict. c. 42). It also includes chattels real, and realty in respect of which a contract of sale was made before the vendor's death, but does not include realty in respect of which the will contains a direction for sale, nor estates *pur autre vie* (which pay legacy or succession duty, according to their character).

The duty falls on all beneficial interests, whether in possession or remainder, vested or contingent, and on property disposed of by will under a general power of appointment; but not on mere bare legal interests, although they are vested in the executor or administrator by a grant of probate, etc.

The character or local situation of an asset, for purposes of duty,

depends on where and in what form it was at the death (*Laidlay v. Lord Advocate*, 1890, 15 App. Cas. 168; *Lord Sudeley v. A.-G.*, [1897] App. Cas. 11). Personalty in transit to the United Kingdom at the death is treated as taxable (*A.-G. v. Pratt*, 1874, L. R. 9 Ex. 140). Debts and sums of money due and owing from any person in the United Kingdom to any person at his death on an obligation or other specialty are part of his estate for probate duty (25 & 26 Vict. c. 22, s. 39), and it is immaterial where the obligation or specialty is at the date of the death (Hanson, 4th ed., 239). But where such a debt is due to a person dying, domiciled in the United Kingdom, no duty is payable (*Lord Sudeley v. A.-G.*, [1897] App. Cas. 11).

*Incidence.*—Probate duty, where still leviable, is payable in the first instance out of the general residue of personalty in exoneration of the recipients of pecuniary or specific legacies (*In re Bourne*, [1893] 1 Ch. 188): except in the case of property passing under a general power of appointment, when the duty falls on the trustees or beneficiaries, and is payable by them to the executor or administrator (23 Vict. c. 15, s. 5).

*Exemptions.*—The only exemptions from probate duty are—

1. The effects of common seamen, marines, or soldiers slain or dying in the service of the Crown (55 Geo. III. c. 184, Sched.).
2. Estates comprising personalty not over £100 net value (44 Vict. c. 12, ss. 27, 28).
3. Gifts of personalty to the nation (usage).
4. Second or subsequent grants, when full duty was paid on the first grant (48 Geo. III. c. 86, s. 3).

*Deductions.*—In computing the value of an estate for probate duty the following deductions are allowed:—

1. Reasonable funeral expenses, not including the mourning of the surviving relatives (44 Vict. c. 12, s. 28).
2. Debts due from the deceased to persons resident in the United Kingdom, and payable out of his estate, except (a) voluntary debts payable on death, or under an instrument not delivered to the donee three months before death; (b) debts to which the realty of the deceased is primarily liable; (c) debts in respect of which the executor on payment would be entitled to reimbursement out of the realty of the deceased, e.g., mortgage debts (44 Vict. c. 12, s. 78; Hanson, 4th ed., 334, 356).
3. Mortgages on leaseholds, only the equity of redemption being valued (Hanson, p. 357).

The grant of probate in one part of the United Kingdom is effectual on any other part where the grant has been resealed, and a similar provision exists as to many colonies under the Colonial Probates Act, 1892. A list of such colonies is given in the 1890–1895 Digest to the Law Reports and the subsequent annual Digests and Indices; the Orders in Council are printed in the annual volumes of Statutory Rules and Orders.

#### ACCOUNT DUTY.

The subject of Account Duty, which has been superseded as to deaths since August 1, 1894, by Estate Duty (see *infra*, p. 129), and which will become obsolete, has already been dealt with in vol. i. at p. 71. As to the scope of a "voluntary disposition" in sec. 38 (a) of the Customs and Inland Revenue Act, 1881, see *A.-G. v. Gosling*, [1892] 1 Q. B. 545; and note that in clause (c) of the same section the words "any trust," whether expressed in writing or otherwise, in favour of a volunteer "include a settlement of realty on trust for sale" (*A.-G. v. Dodd*, [1894] 2 Q. B. 150; and see *A.-G. v. Chapman*, [1891] 2 Q. B. 526). Account duty is payable by the donee, and not out of the estate of the deceased

(*In re Croft*, [1892] 1 Ch. 652; *In re Foster*, [1897] 1 Ch. 484; *Lord Advocate v. Robertson*, noted in vol. i. at p. 75, is now reported as *Lord Advocate v. Fleming*, [1897] App. Cas. 145; and see also *A.-G. v. Lord Aberdare*, 1892, 61 L. J. Q. B. 618).

#### LEGACY DUTY.

Legacy duty was first imposed in 1780 (20 Geo. III. c. 28) as a stamp duty on receipts given by legatees to executors for their legacies. Since 1796 (36 Geo. III. c. 52) it has been a stamp duty, denoted, but not collected, by means of stamps, and levied on so much of the personal property of a deceased person as goes to a legatee or next-of-kin. For the statutes, see Hanson, 4th ed., 36.

It differs from probate duty, in that liability to duty depends not on the situation of the property within the jurisdiction of a Court of the United Kingdom, but upon the domicile of the testator or intestate being within the United Kingdom (*Thomson v. Advocate-General*, 1845, 12 Cl. & Fin. 1). It is not affected materially by the estate duty of 1894 (r. p. 130).

A legacy for purposes of duty is a gift by will, or a devolution on intestacy, to have effect, or be paid or satisfied out of the following property of the testator (*Lord Advocate v. Bogie*, [1894] App. Cas. 83):—

1. Pure personalty, but not leaseholds, which, since 1853, are subject to succession duty (16 & 17 Vict. c. 57, s. 19), but including other personalty of which the deceased was competent to dispose (*Drake v. A.-G.* 1843, 10 Cl. & Fin. 257).
2. Estates *pur autre vie*, applicable as personalty (36 Geo. III. c. 52, s. 20; Hanson, 4th ed., 462). See *Succession Duty*, *infra*.
3. Realty which at the date of the death would be treated in equity as personalty.
4. Moneys payable out of, or charged on, or to arise from the sale of realty, directed by will or charged on realty by will, if the testator died before 1 July, 1888 (see *In re de Houghton*, [1896] 1 Ch. 855). Legacy duty under this head is superseded by succession duty as to deaths on or since that day (57 Vict. c. 8, s. 21).
5. Moneys directed to be applied in buying realty till so applied (36 Geo. III. c. 52, s. 19; Hanson, 4th ed., 27).

Except in the case of devolution to next-of-kin on intestacy, property is not subject to legacy duty, except where it devolves by way of gift.

Donations *mortis causâ* are subject to legacy duty (8 & 9 Vict. c. 76, s. 4). A conditional gift is subject to duty except so far as the condition involves augmentation of the testator's estate. "Gift" for this purpose includes bequests to executors, or forgiveness by will of a debt (Hanson, 4th ed., 416).

It is immaterial, except on the question of the rate at which duty is leviable, whether the gift is out of absolutely free personalty, or out of personalty of which the testator was competent to dispose, and did dispose, by will. In the latter case, if the legacy is given in exercise of a *general* power of appointment, the scale is determined by the relationship of the legatee to the testator, if in exercise of a *special* power of appointment by the relationship of the legatee to the person who created the power.

The creation by will of a *general* power of appointment, coupled with a limited interest given to the donee of the power, is treated as a legacy to the donee, on his exercising the power by *deed* or *will*, and where the *general* power is coupled with a gift to the donee absolutely, in default of exercise of the power, it operates as a legacy to the donee if he fails to appoint. But exercise of a limited power of appointment under a marriage settlement does not render the appointee liable to legacy duty (36 Geo. III. c. 52, s. 7).

A legacy to a person who predeceases the testator, if given in such terms as not to lapse but to pass to his representatives, is subject to duty.

*Scale of Duty.*—This is prescribed by 55 Geo. III. c. 184, sched. Part III. No duty is payable on legacies by husband to wife, or *vice versa*, nor on property passing to either spouse under the Statute of Distributions. But where a joint tenancy between such a person and a person liable to duty is created, the latter pays the duty on his interest, and if he survives, also on his survivorship (Hanson, 4th ed., 28).

1 per cent. duty is levied on legacies to lineal ancestors or descendants.

This is not levied where probate duty, account, or estate duty has been paid on the estate.

3 per cent. is levied where the relationship is that of brother or sister, or a descendant of either.

5 per cent. is levied where the relationship is that of uncle or aunt, or descendant of either.

6 per cent. is levied where the relationship is that of great uncle or great aunt, or of a descendant of either.

10 per cent. is levied where the relationship is more remote, or the parties are strangers.

The husband or wife of a person more nearly related than himself or herself to the testator or intestate pays at the proper rate for the nearer relationship (16 & 17 Vict. c. 51, s. 11).

*Exemptions from duty.*—

1. Legacies to a spouse of the deceased (55 Geo. III. c. 184, s. 2, sched.).
2. Legacies to or for the benefit of the Royal Family (55 Geo. III. c. 184, s. 2, sched.).
3. *Specific* legacies under the value of £20 (55 Geo. III. c. 184, sched.). Pecuniary legacies under that amount pay duty (44 Vict. c. 12, s. 42).
4. Money left to pay duty, if payable out of a fund other than the legacy (36 Geo. III. c. 52, s. 21).
5. Estates of which the personalty is not worth over £100 (43 Vict. c. 14, s. 13; Hanson, 4th ed., 523).
6. Estates of a net value under £1000 (exclusive of property settled by will) on which estate duty is paid.
7. Books, prints, and specific articles given to a corporation for preservation but not for sale (39 Geo. III. c. 73, s. 1; 55 Geo. III. c. 184, s. 2, sched.).
8. Plate, furniture, and other things not yielding income given to different persons in succession, until they come to a person competent to sell (36 Geo. III. c. 52, s. 14).
9. Settled property on which estate duty has been paid since the date of the settlement (57 & 58 Vict. c. 30, s. 5 (2)).
10. Certain legacies for charitable purposes in Ireland left by persons domiciled in Ireland (Hanson, 4th ed., 520).
11. Sums paid over without grant of probate or administration.
  - (a) Not exceeding £100 under the Savings Bank Acts (24 & 25 Vict. c. 14, s. 14; 26 & 27 Vict. c. 87, s. 41); the Civil Service Superannuation Act, 1887 (50 & 51 Vict. c. 67, s. 8); the Navy and Marines Deceased Property Act, 1865 (28 & 29 Vict. c. 111, s. 15); the Army Prize-Money Act, 1864 (27 & 28 Vict. c. 36); the Regimental Debts Act, 1893 (56 Vict. c. 5).
  - (b) Not exceeding £80 under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39, ss. 26, 27); and the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25, ss. 57, 58); and so much of the Provident Nominations Societies Act, 1883 (46 & 47 Vict. c. 47), as is left by the two Acts last named.
  - (c) Not exceeding £50, payable to intestate depositors, etc., in a loan society or building society (3 & 4 Vict. c. 110, s. 11; 37 & 38 Vict. c. 42, s. 29).

The collection of the duties is in the hands of the Inland Revenue Department, which for this purpose inspects the records of the Probate Division and the original wills deposited in the Probate registries (see Stamp Act, 1891 (54 & 55 Vict. c. 39, s. 16); Hanson, 4th ed., 396).

The duties are leviable whether the legacy is pecuniary or specific (36 Geo. III. c. 52, ss. 22, 23); but in the latter case the executors value the article bequeathed, subject, if the Inland Revenue require, to a valuation on their account (36 Geo. III. c. 52, s. 22; *A.-G. v. Dardier*, 1883, 11 Q. B. D. 19; *A.-G. v. Smith*, [1893] 1 Q. B. 239). In the case of an absolute and immediate legacy there is no difficulty in calculating and paying at once the duty on the pecuniary amount or the valuation, and the executors pay it before handing over the legacy.

Where an annuity is bequeathed, the executors calculate its value by the succession-duty tables, and pay by four yearly payments; but if the annuitant dies before the four years are out the duty is payable only on the instalments actually accrued (36 Geo. III. c. 52, s. 8). Where the annuity is charged on another legacy, the rule is the same, except that the legatee, and not the executor, pays the duty (s. 9). Where a sum of money is bequeathed to buy an annuity, the duty is paid on that sum; but where direction is given to buy an annuity of a certain amount, the duty is paid on the capital value on the succession-duty tables of such an annuity (36 Geo. III. c. 52, s. 10).

Where the legacy is of such a nature (*e.g.* for the maintenance of human beings or animals) that its value can be calculated only by the payments made, it is so calculated (36 Geo. III. c. 52, s. 11).

Where a legacy is settled, or subjected to a power of appointment by a person having a limited interest, the following rules apply (36 Geo. III. c. 52, ss. 12, 15, 18):—

- (a) If the legacy is of things yielding income, no duty is paid till they are sold or come into the hands of some one who has power to sell.
- (b) If the successors under the settlement would all pay duty at the same rate, the duty is paid on the capital at once by the executor.
- (c) If the successors would pay at different rates the life estates are calculated as annuities, and paid when the life estates come into possession; while the person to whom the *corpus* ultimately goes pays on the full value when it falls into possession.

The duty on legacies given in joint tenancy is payable in proportion to the dutiable interest of the parties (36 Geo. III. c. 52, s. 16).

Legacies given subject to a contingency which may defeat the gift are subject to duty, regardless of the contingency; but in certain events the duty is recoverable if the contingency is defeated (36 Geo. III. c. 52, s. 17; Hanson, 4th ed., 28).

A legacy may be disclaimed, in which case no duty is payable (36 Geo. III. c. 52, s. 24), or released or compounded, in which case the duty is payable on the consideration for the release, if less than the legacy (36 Geo. III. c. 52, s. 23). No duty is payable if the legacy lapses or is void for remoteness or other cause.

Where funds subject to duty fall under the control of a Court, it is bound in the orders made as to the fund to secure payment of the duty (36 Geo. III. c. 52, s. 25), which is effected in England under the Supreme Court Fund Rules, 1894, rr. 20, 52, 66.

The duty falls due on the death of the testator or intestate, but is calculated on the value of the legacy at the date of payment or retainer (the executor having his year in which to administer). So that accretions, if any, accrued since the death are taxable (see Hanson, 4th ed., 403).

The burden of the duty falls not on the estate of the testator or intestate, but upon the legatee, unless in the case of a will the testator has otherwise

expressly directed (36 Geo. III. c. 52, s. 21; *In re Saunders*, [1897] 1 Ch. 38), and even then, if the residue is insufficient, the legatee must pay. The executor is entitled to recover against the specific legatee any duty paid for his account. The executor, administrator, or executor *de son tort* is, however, primarily liable, except in the case of annuities or settled legacies (36 Geo. III. c. 52, ss. 6, 9, 13, 14, 24, 35) as soon as he has appropriated the legacy, so as to divest him of his control over it. The duty on legacies chargeable on realty or the proceeds of its sale is payable by the trustees of the realty (48 Geo. III. c. 28, s. 5).

Before retaining legacies, the executor must transmit particulars and duty to the Inland Revenue (36 Geo. III. c. 52, s. 35). Receipts for Taxable legacies must be taken in the form prescribed and provided by the Inland Revenue, stamped with the duty payable, either before or within twenty-one days of giving the receipt (36 Geo. III. c. 52, ss. 25, 26, 27, 29). No receipt stamp need be affixed to such receipt (36 Geo. III. c. 52, s. 41). If this is not done, the accountable person is liable to penalty (ss. 28 and 35). The time for stamping can be extended (48 Geo. III. c. 149, s. 44).

Where duty is not retained or paid, or, if received, is not paid over by the executor or legatee, or a purchaser from the legatee, they become Crown debtors (see CROWN DEBTS) (36 Geo. III. c. 52, s. 6; 13 & 14 Vict. c. 97, s. 8), and the arrears bear 3 per cent. interest, and summary proceedings can be taken to require and compel a proper account (16 & 17 Vict. c. 51, s. 48; 28 & 29 Vict. c. 104, ss. 54-64). An executor can limit his liability for duty by obtaining a certificate from the Inland Revenue Department, which discharges him as to all claims for duty disclosed by him (43 Vict. c. 12, s. 12); and where a full account of all the dutiable legacies has been rendered and settled, all liability on the executor or legatees ceases after six years from the settlement (52 & 53 Vict. c. 8, s. 14). Where duty is underpaid by mistake, a fresh account is delivered by the accountable person; where it is overpaid, repayment is made, or if refused, is enforceable by petition of right (36 Geo. III. c. 52, s. 30).

#### SUCCESSION DUTY.

Succession duty was first created by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). It is a tax placed on the gratuitous acquisition of certain classes of property, passing partly or wholly because or on the occasion of the death of any person, by means of a transfer from one person—the predecessor—to another—the successor—of a beneficial interest in certain classes of property coming into possession after May 19, 1853 (Hanson, *Death Duties*, 4th ed., 40). This tax bears a somewhat similar relation to legacy duty to that borne by account duty to probate duty.

*Property Chargeable.*—The property chargeable with the tax, called in the Act a succession (16 & 17 Vict. c. 51, s. 1), is—

- (a) All realty and chattels real in the United Kingdom.
- (b) All personalty not subject to legacy duty (*q.v.*), which, the beneficiary claims under English, Scotch, or Irish law, or to obtain which, if litigation were necessary, resort would have to be to an English, Scotch, or Irish Court, *i.e.* the forum for administration whereof is the Court of the United Kingdom. In this respect the duty corresponds to probate duty, and not to legacy duty. The effect of the provision is to render taxable a settlement, whether by deed or will, of property vested in trustees resident in the United Kingdom, made by any person, even one domiciled abroad. It is immaterial where the settled property is, if the forum of administration of the trusts of the settlement is in the United Kingdom.
- (c) Money to arise under a trust for sale of realty under the will of a person dying

after June 30, 1898, or under a trust for sale with a direction to reinvest in government or real securities or land (unless legacy duty is paid) (51 & 52 Vict. c. 8, s. 21 (2)). See *Lord Advocate v. Fleming*, [1897] App. Cas. 145, cited as *Lord Advocate v. Robertson*, vol. i. at p. 75 (5); *A.-G. v. Lord Wolverton*, [1897] 1 Q. B. 231.

The transfer must be either (1) by a devolution of law, *i.e.* by inheritance, or under the Statute of Distributions, or (2) by disposition, *i.e.* by any conveyance, will, assignment, contract, act, or obligation by which one person confers on another a beneficial interest in the taxable property otherwise than for money or money's worth, thus excluding sale or purchase, but not antenuptial settlements nor voluntary settlements.

A succession is taxable even (1) if an interval elapses between the death and the succession, or (2) if the succession merely accelerates possession of property which would have been otherwise acquired by effluxion of time, or (3) if the interest taken is not immediate and is reversionary or contingent. But in these cases the date of payment of duty is postponed till the successor gets possession.

*Scale of Duty.*—The scale of duty under the Act of 1853 is calculated on the capital value of the property or interest constituting the succession, and is payable at the same rates according to the consanguinity or affinity of predecessor and successor as in the case of legacy duty (16 & 17 Vict. c. 51, s. 11, *ante*, p. 124).

In the case of successions arising on deaths since June 30, 1888, the 1 per cent. duty is increased to  $1\frac{1}{2}$  per cent., and each other rate in the scale is increased by  $1\frac{1}{2}$  per cent. These additions did not apply to succession to chattels real nor to property subject to account duty (51 & 52 Vict. c. 8, s. 21), and they are not levied on successions in respect of deaths since August 1, 1894, in respect of which estate duty is payable and paid, nor is the 1 per cent. succession duty levied in such a case (57 & 58 Vict. c. 30, s. 21 (1), Sched. 1.).

*Valuation.*—The mode of valuation of realty differs according as the succession arises on a death before or since the commencement of the Finance Act, 1894 (August 2, 1894).

Prior to August 2, 1894, the interest of the successor was treated as an annuity equal to the annual value of the property, and lasting from the beginning to the end of the possession of the successor, or in the case of succession to an estate *pur autre vie* or a term of years, lasting for the term or an estimate of the life of the *cestui que vie*. The annuity is calculated (16 & 17 Vict. c. 51, s. 21) by reference to elaborate tables scheduled to the Act of 1853, and not here printed.

As to deaths on or since August 2, 1894, an interest of which the successor is competent to dispose is valued in the same way as for estate duty, *i.e.* on its principal value or market price at the death (57 & 58 Vict. c. 30, s. 18, and see below, p. 133). But a limited interest is valued under the Act of 1853, subject to the deductions for agricultural land applied in the case of estate duty (see below p. 133).

In the case of personalty, successors absolutely entitled pay on the principal value; successors to limited interests on the principal value of an annuity or yearly income estimated under the 1853 tables. For this purpose realty is treated as personalty if subject to a trust for sale, unless there is also a trust to reinvest in land with a limited interest to the successor. Personalty subject to a trust for investment in land is treated as personalty if the successor is to be absolutely entitled to the land, but as realty if he only acquires a limited interest.



*Deductions and Allowances* (see Hanson, 4th ed., 58).—

1. Land yielding no income when the successor becomes entitled in possession has no annual value (*Lord Advocate v. Duke of Buccleuch*, 1888, 15 Retlie, 333; *A.-G. v. Sefton*, 1895, 11 H. L. 257).
2. Necessary outgoings are allowed for in estimating the annual value of lands yielding an income not of a fluctuating character, besides the special allowances for agricultural land (*post*, p. 133).
3. Manors, mines, and other land yielding a fluctuating income are valued after deducting necessary outgoings on the average income for a period of years agreed on between the revenue and the successor, or at 3 per cent. on the principal value.
4. Fines, reliefs, and incidents of tenure which the successor has to pay (*e.g.* on copyhold succession) are deducted.
5. Mortgages created by the successor, except in exercise of a prior special power of appointment, may not be deducted, but allowance is made for all other incumbrances or permanent improvements effected by the successor before going into possession. Contingent incumbrances are not deducted until they become an actual charge.
6. Allowance is made for contingencies which may alter or determine the successor's interest, but not till they occur, and for property other than a succession, which the successor forfeits to another upon coming into his succession.
7. Where a donee of a general power exercises it so as to acquire a succession in his own favour, duty already paid by the donee in respect of a limited interest is allowed for.
8. In the case of successions to realty since August 1, 1894, in favour of a person competent to dispose of the property, allowance is made (1) for estate duty payable thereon and the expense of raising and paying it; (2) for the principal value of incumbrances not created by the successor, nor made in exercise of a prior power of appointment.

*Exemptions.*—

1. Successions by one spouse to another (16 & 17 Vict. c. 51, s. 18).
2. Property of less principal value than £100 (16 & 17 Vict. c. 51, s. 18).  
There was an exemption of successions of a less taxable value than £20, which has ceased as to successions arising since May 31, 1889 (52 Vict. c. 7, s. 10(2)).
3. Property applied to pay duty under trust for that purpose (16 & 17 Vict. c. 51, s. 18). But money bequeathed on such a trust pays legacy duty (Hanson, 4th ed., 643).
4. The 1 per cent. duty is not payable where probate duty or account duty has been paid prior to August 2, 1894, and neither the 1 per cent. nor the extra duties of 1889 are payable where estate duty has been paid under the Finance Act, 1894; nor in the case of settled property can the 1 per cent. duty be charged where estate duty has been paid, until the property reaches a successor competent to dispose of it.
5. (a) Personal estate not exceeding £300 on which the fixed stamp duty of 30s. has been paid (57 & 58 Vict. c. 30, s. 16); and (b) estates of an aggregate value not exceeding £1000 (exclusive of property settled by will) are also free from succession duty (57 & 58 Vict. c. 30, s. 16).
6. Property so disposed of as to become liable for legacy duty if that has been paid (16 & 17 Vict. c. 51, s. 18; Hanson, 4th ed., 645).
7. Timber, trees, or wood (not being coppice or underwood) until sold, when duty is charged on the net proceeds of sale (16 & 17 Vict. c. 51, s. 23; *Dashwood v. Magniac*, [1891] 3 Ch. 306).  
This exemption does not apply where the duty is calculated on the principal value. The exception of coppice and underwood is because they yield a yearly or periodical profit.
8. Plate, furniture, and articles not yielding income, left in settlement until they come to a successor competent to dispose of them (36 Geo. III. c. 52, s. 14; 16 & 17 Vict. c. 51, s. 32).
9. Advowsons and other rights of Church patronage until they are sold, when the duty is paid on the money or money's worth, which is the consideration on sale (16 & 17 Vict. c. 51, s. 24).

*Incidence and Payment.*—The duty falls on the capital value of the succession, and attaches on its creation by the death, but is not payable till the

successor comes into enjoyment. If he fails to do so by the operation of a paramount right, or the exercise of an overriding power of appointment, his succession lapsing, the liability to duty also ceases. If the successor gives his succession away, the assignee pays the duty at the time and to the extent when and to which the assignor was liable. If an expectant successor sells his succession, the purchaser is liable as and when the seller would have been (16 & 17 Vict. c. 51, s. 2; Hanson, 4th ed., 558).

The duty is a personal debt due to the Crown (1) from the successor, i.e. the beneficiary under the succession; (2) from any trustees or the like, in whom the legal interest or powers of control or management of the succession are vested; and (3) from persons in whom it is vested by derivative title when it falls into possession. It is a first charge on the succession or on any property purchased with the proceeds of its sale.

In the case of realty or personalty given for charitable or public purposes the whole duty (at 10 per cent.) is payable on the principal value, as soon as the succession falls into possession.

In other cases the rules as to payment are as follows:—

The duty on realty is paid (1) by eight equal half-yearly instalments—the first at the end of a year after taking possession; or (2) in the case of a succession arising on a death after June 30, 1888, either as in (1) or by moieties and instalments extending over four or eight years; or (3) in the case of a succession arising on a death after August 1, 1894, by eight equal yearly instalments, or sixteen equal half-yearly instalments, at the option of the successor.

If a successor, who has an interest of which he is not competent to dispose, dies before his instalments are paid, the right to further payment ceases (16 & 17 Vict. c. 51, s. 21).

Special provision is made as to derived or transmitted successions to realty (16 & 17 Vict. c. 51, s. 14).

In the case of personalty, if the succession gives an absolute interest, the whole duty is immediately payable; but if the interest is for life or years the duty is paid by four equal yearly instalments, beginning at the end of the first year after taking possession. If a life drops before the duty is all paid, the duty is recalculated with reference to the actual duration of the succession (Hanson, 4th ed., 57).

#### ESTATE DUTY.

The term "estate duty" has been applied to three distinct taxes—

- (a) "Temporary estate duty" under the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7).
- (b) "Estate duty" under the Finance Act, 1894 (57 & 58 Vict. c. 30, s. 1).
- (c) "Settlement estate duty" under the same Act (s. 5).

#### TEMPORARY ESTATE DUTY.

The temporary estate duty was a stamp duty levied (a) in respect of the value of the estate and effects of any person dying before June 1, 1896, in respect of which application for probate or administration was granted after May 31, 1889; (b) in respect of an account delivered after May 31, 1889, in relation to the death of a person dying before June 1, 1896; (c) in respect of the value of a succession upon the death of a person dying after May 31, 1889, and before June 1, 1896.

The duty was levied at the rate of 1 per cent.—

- (a) Where the value of the estate or effects liable to probate or account duty exceeded £10,000 (52 Vict. c. 7, s. 5 (1), (2), (4)).
- (b) Where the value of the succession exceeded £10,000, or where

the value of a succession to realty, under a will or intestacy, did not exceed that sum alone, but did so when aggregated with any other benefit taken by the successor under the same will or intestacy (52 Vict. c. 7, s. 6 (1), (4)).

The incidence of the duty as to specific and general legatees was the same as that of probate duty, i.e. the tax was payable out of the general residue, if sufficient (*In re Bourne*, [1893] 1 Ch. 188; and *cp. In re Countess of Oxford*, [1896] 1 Ch. 257; *In re Foster*, [1897] 1 Ch. 487).

This duty was superseded as from August 2, 1894, by the new estate duty of 1894 (*infra*), where payable and paid, and has wholly ceased as to deaths subsequent to June 1, 1896 (52 Vict. c. 7, s. 7).

#### NEW ESTATE DUTY.

The tax now known as estate duty is that created by the Finance Act, 1894 (57 & 58 Vict. c. 30). In the case of deaths since August 1, 1894, this tax, where payable and paid, takes the place of PROBATE DUTY and ACCOUNT DUTY (*q.v.*, and see *ante*, pp. 120-22). It differs from these duties in being levied on property to which they did not extend, *e.g.* realty and personalty of a domiciled Englishman situate outside the United Kingdom, but resembles them and differs from succession duty in being levied, not on the value of the interest to which a person succeeds on death, but on the value of the interest which ceases on death (Hanson, *Death Duties*, 4th ed., 63). It resembles temporary estate duty in the fact that it falls more heavily on the larger estates or successions, and that in its calculation provision is made for aggregation. Thus much premised by way of comparison, it remains to state the exact nature and incidence of the tax. This tax is a stamp duty leviable on *all* property which, on the death of any person after August 1, 1894, or at a period ascertainable only by reference to such death, passes either immediately or after an interval, either certainly or contingently, and either originally or by way of substitutive limitation. It is immaterial whether the property is real or personal, settled or unsettled; and apparently immaterial where the person dies, if representation must be taken out in England; and as to realty and chattels real, immaterial whether the deceased is or is not domiciled in the United Kingdom (Hanson, 4th ed., 88). In the case of the late Emperor of Russia, it has been admitted that his personalty in England was subject to the estate duty, though it was not levied. And the word "property" includes personalty subject to a British settlement, but situate abroad, and passing on the death of a person domiciled abroad.

Property for the purposes of the Act is said to pass on a man's death—

1. Of which at his death he was competent to dispose, i.e. realty and personalty in the United Kingdom—
  - (a) whether it be property held in fee-simple or absolutely by or in trust for the deceased;
  - (b) or property of which the deceased was tenant in tail in possession or remainder, except in the case of Scotch realty, on settlements of which the subsequent limitations continue to subsist on the death of the deceased;
  - (c) or property, including interests in expectancy (57 & 58 Vict. c. 30, s. 22 (1), (j)), wherever situate, over which the deceased had at his death a *general* power, exercisable by him solely (see *A.-G. v. Charlton*, 1877, 2 Ex. D. 398) to appoint or dispose of it as he thought fit, other than powers exercisable by him as a trustee under a disposition not made by himself (see 44 Vict. c. 38, s. 12; 57 & 58 Vict. c. 30, s. 2 (1), (c)), or as a tenant for life under the Settled Land Acts, or as a mortgagee, except, of course, realty or chattels real outside the United Kingdom.
  - (d) or money which the deceased had a *general* power to charge on property (s. 22 (2) (c));

- (e) or terms of years of which the deceased had absolute power to dispose in right of his wife without her concurrence.
2. In which the deceased or another had a beneficial interest, ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the ceasing of such interest (57 & 58 Vict. c. 30, s. 2 (1), (b); *A.-G. v. Wood*, [1897] 2 Q. B. 102). Where the deceased had settled the property on himself for life, and after his death on others, with an ultimate reversion of an absolute interest or power of disposition to the settlor, the property does not "pass" if, while the settlor is in as tenant for life, the remainderman dies, and the settlor thereby acquires an absolute interest or power (59 & 60 Vict. c. 28, s. 14). Where a disposition of property confers upon another who had never, prior to the disposition, been competent to dispose thereof, an interest for life or determinable on his death, in respect whereof the donee entered into and retained possession to the complete exclusion of the donor, the property is not held to pass by the death of the life-tenant after July 1, 1896, merely because it reverts to the donor in his own lifetime (59 & 60 Vict. c. 28, s. 15 (1), (2), (3)). Where the property is settled, and the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property is not deemed to pass on that death within the meaning of sec. 2 of the Act (57 & 58 Vict. c. 30, s. 5 (3); *A.-G. v. Wood*, [1897] 2 Q. B. 102). It is as yet uncertain what is the principle laid down (s. 7 (7)) to be employed in calculation of the principal value under this head, i.e. whether the tax is leviable on property in which the deceased had an interest, or on the interest which he had to the extent to which benefit accrues by its ceasing (*A.-G. v. Wood*, [1897] 1 Ch. 102, at 107, 111; Hanson, 4th ed., 102); but, subject to the provision next to be stated, sec. 2 of the Act of 1894 appears to apply even when an interest in possession does not pass.
3. Realty or personalty of which the deceased has disposed during his life in a manner ineffectual for the purpose of avoiding this tax, i.e. —
- (a) Absolute gifts of realty or personalty made within a year before death, e.g. *donationes mortis causa*. It is not clear whether this includes antenuptial marriage settlements (Hanson, 4th ed., 109).
  - (b) Gifts *inter vivos* of realty or personalty by way of settlement, or otherwise, made over twelve months before death, but which are in form immediate, and give possession and enjoyment, with a reservation by contract or otherwise to the giver of some interest or benefit out of or connected with the property given (57 & 58 Vict. c. 30, s. 2; *A.-G. v. Worsall*, [1895] 1 Q. B. 99; *A.-G. v. Montefiore*, 1888, 21 Q. B. D. 461).
  - (c) Gifts *inter vivos* of policies of insurance on the life of the deceased when he has continued to pay the premiums wholly or in part to the extent to which he has kept up the policy. Most of the property included under this head was previously subject to account duty (see 44 & 45 Vict. c. 12, s. 38; 57 & 58 Vict. c. 30, s. 2 (1), (c); *Lord Advocate v. Fleming*, [1897] App. Cas. 145).
  - (d) Annuities or other interests purchased or provided by the deceased alone, or in concert or by arrangement with another, to the extent of the beneficial interest accruing by survivorship or otherwise on his death (57 & 58 Vict. c. 30, s. 2 (1), (d)).
  - (e) Property to which the deceased was absolutely entitled, but which he, by purchase, investment, or otherwise caused to be vested in another jointly with himself, so as to pass the beneficial interest to the other.
  - (f) Property passed by a non-testamentary settlement by the deceased, whether made before or after the commencement of the Act (August 2, 1894), where an interest in the property or the proceeds of its sale, determinable by reference to death, or a power of revocation, is reserved to the settlor.

Property situate out of the United Kingdom is taxable only when it was, under the law in force prior to 1894, subject to LEGACY DUTY or SUCCESSION DUTY (*q.v.*), or would be so liable but for the fact that it passes on the death from husband to wife, or *vice versa* (57 & 58 Vict. c. 30, s. 21).

*Exemptions.*—The following property is exempt from estate duty:—

In the case of persons dying after August 1, 1894—

1. The property of common seamen, not including warrant officers, marines, or soldiers (rank and file only), who are slain or die in the service of the Crown (57 & 58 Vict. c. 30, s. 8 (1)).

2. Estates under £100 (s. 11).
3. Sums under £100, which can be paid without requiring representation (s. 8 (1); see p. 121 *ante*).
4. A single survivorship annuity not exceeding £25 (s. 15 (1)).
5. Property in which the deceased was interested only as holder of an office, or recipient of the benefits of a charity, or as a corporation sole (s. 2 (1) (b)).
6. Advowson, and other rights of church patronage not subject to succession duty.
7. Property held by the deceased only as a trustee (s. 15 (4)). Where the trust was created by the deceased, it must have been constituted in good faith over twelve months before his death, the equitable possession transferred to the beneficiary, and no benefit reserved to the settlor (s. 2 (3)).
8. The life interest of a deceased spouse in the income of property settled by the survivor before August 2, 1894 (s. 21 (5)); *A.-G. v. Strange*, 1897, 13 T. L. R.).
9. Settled property to which the deceased had not succeeded at his death, if the subsequent limitations of the settlement still subsist (s. 5 (3)).
10. Settled property, in respect of which estate duty has been paid once since the settlement, and of which the deceased had never been competent to dispose; except property settled by statute or Royal Charter, so as to be inalienable (s. 5 (2)).
11. Personalty settled by a person dying before August 2, 1894, in respect of which probate or account duty is payable or paid, and of which a person deriving title from the settlor, and dying after August 1, 1894, has never been competent to dispose (s. 21 (1)); *A.-G. v. Dodington*, [1897] 1 Q. B. 722; *C. A. 13 T. L. R. 533*).
12. Property passing only because of a *bond fide* purchase from the person under whose disposition it passes, for full valuable consideration paid to the vendor for his own benefit (s. 31).
13. Reversions on a lease for lives or determination of an annuity for lives where full valuable consideration was paid for either to the grantor (s. 3).
14. Property in which an interest in expectancy was, before August 2, 1894, sold or mortgaged for full valuable consideration, but which falls into possession after that date, so far as concerns purchaser or mortgagee (s. 21 (3)).
15. Pensions or annuities payable by the Indian Government to the widow or child of a deceased officer of that Government (s. 15 (3)).
16. Property situate out of the United Kingdom in respect of which legacy duty or succession duty was not payable, irrespective of consanguinity or affinity (s. 2 (2)).
17. Works of art, etc., given for national purposes, when the Treasury remit the duty (1894, s. 15 (2)).

In the case of persons dying after June 30, 1896—

18. Pictures, prints, books, MSS., works of art, scientific collections, and other things not yielding income, which appear to the Treasury to be of national, scientific, or historic interest, and settled so as to be enjoyed in kind in succession by different persons. The exemption continues until the property is sold or comes into possession of a person competent to dispose of it (59 & 60 Vict. c. 28, s. 20).
19. The enlargement of the interest of the settlor in settled property, or the reverter of property to the disponent in consequence of a death after June 30, 1896 (59 & 60 Vict. c. 60, ss. 14, 15).
20. The acquisition by a wife of real estate in consequence of her husband's death after that date (59 & 60 Vict. c. 60, s. 16).

**Deductions.**—Where probate, account, legacy, or succession duties or temporary estate duty have been paid before August 2, 1894, on the capital value of property subject to a settlement made by will or disposition which took effect before that date, the amount of such duties is deducted or allowed out of any estate duty which becomes leviable on the property (59 & 60 Vict. c. 28, s. 21).

**Small Estates.**—Where the gross value of the realty and personalty in respect of which the duty is payable exceeds £100, but does not exceed £300, a fixed duty of 30s., and where it is between £300 and £500, a fixed duty of 50s. is payable, subject, of course, to the right to pay by scale where the net value is so much less than the gross as to make this course more

advantageous to the estate (Hanson, 4th ed., 224); and secs. 33, 35, 36 of the Customs and Inland Revenue Act, 1881, as to a cheap mode of obtaining probate, are applied to such estates, the cost of getting probate being 15s., and 2s. 6d. for sealing the probate in any part of the United Kingdom other than that in which it was obtained, and no interest being payable if the duty is paid within twelve months of the death (57 & 58 Vict. c. 30, s. 16 (1), (2), (4), (5)).

Where the net value of the taxable property, real and personal (excluding property settled otherwise than by the will of the deceased), does not exceed £1000, the real and personal property are not aggregated together nor with the settled property, but each class is treated for duty as a separate estate, and when the fixed duty or estate duty thereon is paid, the settlement estate duty and legacy and succession duties are not payable under the will or intestacy of the deceased in respect of such estate (57 & 58 Vict. c. 30, s. 16 (3); Hanson, *Death Duties*, 4th ed., 225).

*Valuation.*—The principal value for purposes of duty is what the Commissioners of Inland Revenue think would be the gross price of the taxable property if sold in the open market at the time of the death of the deceased (57 & 58 Vict. c. 30, s. 7 (5)). In the case of agricultural property (when not affected by expectation of an increased income therefrom), the principal value is not to exceed twenty-five times the annual value as ascertained under Schedule A of the Income Tax Acts (see 5 & 6 Vict. c. 42), after making such deductions as were not allowed under that assessment, but are allowable under the Succession Duty Act, 1853 (see 16 & 17 Vict. c. 51, ss. 22, 28), and a deduction not exceeding 5 per cent. for expenses of management. To this principal value is to be added all income accrued on the taxable property down to and outstanding, *i.e.* not received when the deceased died (57 & 58 Vict. c. 30, s. 6 (5)).

In calculating the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased the following rules are applied:—

1. If the interest extended to the whole income, the value is the principal value of the property passing (s. 7 (7)).
2. If the interest extended to less than the whole income of the property, the value seems to be the principal value of an addition to the property equal to the income to which the interest of the deceased extended, without making any deductions under sec. 7 (1) of the Act of 1894 (*In re Earl Conley*, [1897] 2 Q. B. 47). But the meaning and effect of sec. 7 (7) and its consistency with sec. 21 (6) is by no means yet ascertained (*A.-G. v. Wood*, [1897] 2 Q. B. 102).

*Deductions.*—The deductions permitted in calculating the taxable amount of the principal value are as follows:—

1. Reasonable funeral expenses, *i.e.* the usual and necessary cost of burying the deceased in a manner suitable to his position in life and means (Williams on *Executors*, 9th ed., 839), whether the deceased was or was not domiciled in the United Kingdom. This is different to the rule as to probate duty.
2. Debts incurred by the deceased in good faith and for full consideration in money or money's worth wholly for the deceased's own use and benefit, and taking effect out of his interest in the principal value of the estate and in respect whereof there is no right which can or effectually exercised to reimbursement from any other estate or person (57 & 58 Vict. c. 30, s. 7 (1) (a), (b)). This provision seems not to apply to liabilities under a contract of suretyship (Hanson, 4th ed., 150). Debts not incurred by the deceased, but for which he is liable, are deducted, whether mature at his decease or merely liabilities which may ripen into debts (Hanson, 4th ed., 147). Allowance is not made in the first instance for debts due to persons resident outside the United Kingdom, unless contracted to be paid in, or charged on property situate in the United Kingdom, except out of the value of foreign personalty in respect of which estate duty is paid

(57 & 58 Vict. c. 30, s. 7 (2)). Such debts are payable primarily out of the assets of the deceased, in the country where the creditor is, and the surplus after payment is remissible to the United Kingdom and is there subject to duty (see *Blackwood v. R.*, 1883, 8 App. Cas. 93). Where the *personality* of the deceased in such place is insufficient to pay the debts of the deceased there, repayment may be made of any estate duty paid in respect of such *personality* (57 & 58 Vict. c. 30, s. 7 (2)).

3. Incumbrances to which the estate of the deceased is subject, both those not created by him and those created by a disposition made by the deceased, unless in the latter case they were created in good faith for full consideration in money or money's worth, wholly for the deceased's own use and benefit, and taking effect out of his interest (57 & 58 Vict. c. 30, ss. 7 (1), (a), 22 (2) (b)). The term incumbrances includes mortgages and terminable charges (s. 22, (1) (k)).
4. Where taxable property is abroad—(a) if its administration or realisation entails increased expense, an allowance not exceeding 5 per cent. may be made by the Inland Revenue in respect of such expense (57 & 58 Vict. c. 30, s. 7 (3)). (b) If any duty is payable in a foreign country in respect of the death, the Inland Revenue must deduct from the principal value the amount of such duty (s. 7 (4)). (c) If any duty is payable in a British possession to which the Act has been applied by Order in Council in respect of the death, the Commissioners must deduct a sum equal to such duty from the estate duty which would otherwise be payable (57 & 58 Vict. c. 30, s. 20 (1), (3)).

The British possessions to which this provision (4) has been applied by Order in Council are: Bahamas (St. R. & O., 1895 (No. 244), p. 125); Barbados (St. R. & O., 1896 (No. 574), p. 89); Bermudas (St. R. & O., 1895 (No. 242), p. 124); British Columbia (St. R. & O., 1896 (No. 958), p. 90); British Guiana (St. R. & O., 1896 (No. 55), p. 88); British India (St. R. & O., 1895 (No. 60), p. 123; Cape of Good Hope (St. R. & O., 1895 (No. 369), p. 127); Ceylon (St. R. & O., 1895 (No. 244), p. 125); Falkland Islands (St. R. & O., 1895 (No. 372), p. 128); Fiji (St. R. & O., 1895 (No. 371), p. 128); Gambia (St. R. & O., 1895 (No. 242), p. 124); Gibraltar (St. R. & O., 1895 (No. 368), p. 126); Gold Coast (St. R. & O., 1895 (No. 368), p. 126); Hong Kong (St. R. & O., 1895 (No. 244), p. 125); Lagos (St. R. & O., 1895 (No. 368), p. 126); Leeward Islands (St. R. & O., 1895 (No. 368), p. 126); Manitoba (St. R. & O., 1896 (No. 968), p. 90); Natal (St. R. & O., 1895 (No. 368), p. 126); New Brunswick (St. R. & O., 1897 (No. 177); New Zealand (St. R. & O., 1895 (No. 59), p. 122); Newfoundland (St. R. & O., 1895 (No. 137), p. 124); Ontario (St. R. & O., 1896 (No. 959), p. 91); Quebec (St. R. & O., 1897 (No. 84); Sierra Leone (St. R. & O., 1896 (No. 30), p. 87); South Australia (St. R. & O., 1896 (No. 243), p. 125); Straits Settlements (St. R. & O., 1895 (No. 244), p. 125); Trinidad and Tobago (St. R. & O., 1895 (No. 370), p. 127); Victoria (St. R. & O., 1896 (No. 29), p. 87); Western Australia (St. R. & O., 1895 (No. 368), p. 126, and 1896 (No. 672), p. 89).

*Scale of Duty.*—The estate duty is levied according to the following scale:—

Where the principal value of the estate when aggregated does not exceed				Rate per cent.	
			£100	nil.	
"	"	exceeds	£100 but does not exceed 500	1	
"	"	"	500	2	
"	"	"	1,000	3	
"	"	"	10,000	4	
"	"	"	25,000	4½	
"	"	"	50,000	5	
"	"	"	75,000	5½	
"	"	"	100,000	6	
"	"	"	150,000	6½	
"	"	"	250,000	7	
"	"	"	500,000	7½	
"	"	"	1,000,000	8	

To this is to be added simple interest at 3 per cent. on the duty from the date of the death (57 & 58 Vict. c. 30, s. 6 (b); 59 & 60 Vict. c. 28, ss. 18, 40). Fractions of £100 were at first chargeable *pro rata* on every £10 or fraction thereof, but are now excluded from computation except in the case of estates between £100 and £200, on which the duty is £1 (57 & 58 Vict. c. 30, s. 17; 58 & 59 Vict. c. 28, s. 17; Hanson, *Death Duties*, 4th ed., 228).

*Aggregation.*—All property passing on a death on which estate duty is leviable (wherever situate), is, for the purpose of fixing the rate of duty, aggregated as one estate, except in the following cases:—

- (a) Property so passing in which the deceased never had an interest, or which under a disposition not made by the deceased passes *immediately* on the death (*i.e.* without any interval (see 57 & 58 Vict. c. 30, s. 22 (1), (b))) to a person other than his wife or her husband is not aggregated with any other property, but treated as a separate taxable estate; but the value of a benefit reserved or given under a disposition (not necessarily a settlement) not made by the deceased to his or her wife or husband, or to a lineal ancestor or descendant of the deceased, is aggregated for duty with the property of the deceased to fix the rate of duty (57 & 58 Vict. c. 30, s. 4).
- (b) Where the net value of the real and personal property passing on the death of the deceased (excluding property settled otherwise than by his will) does not exceed £1000, the realty and personalty are not aggregated together, nor with the settled property, but each is treated for taxation as a separate estate (57 & 58 Vict. c. 30, s. 16 (3)).
- (c) Where the duty on a particular part of the property passing is not leviable at once, that part is not aggregated (57 & 58 Vict. c. 30, s. 21 (5); Hanson, 4th ed., p. 124).

*Incidence.*—The incidence of the estate duty is the same as that of probate duty, so far as relates to property of which the deceased at his death was competent to dispose, *i.e.* it falls on the general residue (*In re Bourne*, [1893] 1 Ch. 188). This is so even in the case of a gift of leaseholds specifically bequeathed (*In re Culverhouse*, [1896] 2 Ch. 251).

The duty on voluntary incumbrances upon property passing to the executor as such falls on the residue; but in the case of substantive settlements by the deceased, the duty is payable out of the appropriate funds (*In re Meyrick*, [1897] 1 Ch. 99). On the death of the deceased, where the property passes by exercise of a power of appointment by another person as donee of the power, in favour of two or more appointees, each is liable for a proportion of the estate duty payable on the fund rateable to the benefit derived from the appointment (*In re Orford*, [1896] 2 Ch. 257). The incidence in this case is not the same as in the case of legacy or probate duty, but corresponds to that of account duty (see *In re Shaw*, [1895] 1 Ch. 343).

The procedure for the collection and recovery of estate duty and settlement estate duty, and of probate and account duty where they are still payable, is substantially the same. For this purpose the taxable property falls into two classes—(a) that over which the executor or administrator of the deceased has control; (b) property over which he has no control, *e.g.* property settled otherwise than by the will of the deceased or hereditaments not passing under the will or on intestacy.

(a) The executor is bound within six months of the death to deliver what is known as the Inland Revenue affidavit, in a form prescribed by the Commissioners of Inland Revenue, with an account and schedule thereto verified by the affidavit, and containing a statement of the property so far as known to him passing on the death, and an estimate of its value (57 & 58 Vict. c. 30, ss. 6, 22 (1), (n), (o)). This affidavit in its original form



(55 Geo. III. c. 184, s. 38) was required to prevent grant of probate by Ecclesiastical Courts without security for payment of death duties (as to Scotland, see 48 Geo. III. c. 149, ss. 38-42; and as to Ireland, see 56 Geo. III. c. 56, s. 117).

Where property subject to estate duty does not pass to the executor as such, he is not the person accountable for the duty, except where the property is personalty of which the deceased was competent to dispose (57 & 58 Vict. c. 30, ss. 6 (2), 8 (3)), including leaseholds specifically bequeathed (*In re Culverhouse*, [1896] 2 Ch. 251). But he may pay the duty on any property which is under his control by virtue of testamentary disposition of the deceased; such as realty, including estates *pur autre vie* devised to the executor, whether in trust or charged with debts (Hanson, 4th ed., 138; Austen-Cartmell, 30). He may also, at the request of the persons accountable (*i.e.* trustees or beneficiaries of the property in question), pay the duty on property not under his control. If he decides to comply with such request, he acquires a power of raising the amount of the duty before or after payment with interest and all expenses properly incurred, by creating a mortgage or terminable charge on the taxable property (57 & 58 Vict. c. 30, s. 9 (5)); but before he can exercise this power he obtains a certificate from the Inland Revenue as to the rateable part of the estate duty which falls on the particular property, which gives him a first charge over such property as against everyone but a *bona fide* purchaser without notice (s. 9 (1), (3)). Where the executor is not accountable, and does not pay on the request of the persons accountable, they must pay on an account setting forth the particulars of the property, including all income accrued, but not paid over at the death, delivered to the Inland Revenue within six months of the death or such extended period as allowed by the revenue authorities. The amount payable thereon, if paid by trustees, etc., when certified by the Inland Revenue, is a first charge on the property, and when the accountable person is a limited owner he is entitled to a like charge as if he had raised the duty by a mortgage to him; or if the property is settled and is sold, can apply the purchase money in payment of duty (s. 9 (2), (3), (6), (7)). The provisions as to charge do not apply to property in a British possession while so situate, nor authorise any proceedings by the Inland Revenue in the possession for recovery of duty (57 & 58 Vict. c. 30, s. 20 (2)).

#### SETTLEMENT ESTATE DUTY.

Settlement Estate Duty is a stamp duty at the rate of 1 per cent. *ad valorem*, created in 1894, and levied on the principal value of property on which estate duty is leviable and which is subject to a settlement, that is to say, to any deed, will, agreement for a settlement, covenant to surrender, copy of Court roll, general or special Act of Parliament (*Vine v. Raleigh*, [1896] 1 Ch. 36), or other instrument or any number of instruments, or to any parol trust under and by virtue of which any land or estate or interest in land or personalty or interest therein stands for the time being limited to or in trust for any person or persons by way of succession, and including any interest in remainder or reversion not disposed of by the settlement, and reverting to the settlor or descending to the testator's heir or next-of-kin (57 & 58 Vict. c. 30, ss. 5 (1), 22 (1), (4); 45 & 46 Vict. c. 48, s. 2). A contingent settlement is subject to the duty though the contingency may never arise (*A.-G. v. Fairley*, [1897] 1 Q. B. 698). The duty is only leviable once during the continuance of the settlement, and, only when the settlement is created by the will of the deceased, or, if it was created by another disposition, when the property passes on the deceased's

death to a person not competent to dispose of it. But where the only, or the outstanding, life interest under the settlement at the deceased's death is that of a spouse, this additional duty is not payable on the death of either spouse (Hanson, 4th ed., 131). The question whether the successor is "competent to dispose" is settled for purposes of duty by reference only to the definition above given, and not by considerations arising on the general structure of the Settled Land Acts, from which the expression is incorporated by reference.

In the case of settlements by statute or royal grant, in which no alienable interest is given, any interest passing on death of a tenant for life is valued for estate duty as for succession duty (57 & 58 Vict. c. 30, s. 5 (5)).

The duty on a legacy or on personalty settled by the will of the deceased (unless the will specifically provides otherwise) is payable out of the settled legacy or property in exoneration of the rest of the deceased's estate, and is collected on an account setting forth the particulars (59 & 60 Vict. c. 28, s. 19).

If *ad valorem* stamp duty has been charged on a settlement under the Stamp Acts (see 54 & 55 Vict. c. 39, Sched. I.), the amount may be deducted from the settlement estate duty on the same property (57 & 58 Vict. c. 30, s. 5 (4)).

Where estate duty has been once paid on settled property since the date of the settlement it is not again leviable until the death of a person who, when he died or at some time during the continuance of the settlement, was competent to dispose of the settled property (57 & 58 Vict. c. 30, s. 5 (2)).

#### ADMINISTRATION OF DUTIES.

The collection of the death duties is assigned to the Inland Revenue Department, which is under the control, subject to Parliament, of the Commissioners of Inland Revenue. The administration of the department is now chiefly regulated by the Inland Revenue Act, 1890, and the Public Accounts and Charges Act, 1891 (see Highmore, *Inland Revenue Regulation Acts*). It is to this department that persons accountable for duties must transmit the prescribed affidavits or accounts and pay the duties.

The department can commute or compound for the duties, and give discount at 3 per cent. for accelerated payment in the case of legacy and succession duty (36 Geo. III. c. 52, s. 33; 16 & 17 Vict. c. 51, s. 39; 43 Vict. c. 14, s. 11; 44 Vict. c. 12, s. 43; 51 Vict. c. 8, s. 22; 57 & 58 Vict. c. 30, ss. 13, 18). They can refund duty paid by mistake, or in excess, or on legacies which have to be refunded (36 Geo. III. c. 52, s. 34), or where the grant under which an executor or administrator acted is revoked (s. 37).

Interest is payable on all death duties at 3 per cent., without deduction of income tax, from the date of the death of the deceased or from the date when the first instalment, if due after six months from the death, becomes due and is recoverable, in the same way as if it were part of the duty, if it is worth the trouble of calculation and account (59 & 60 Vict. c. 28, s. 18).

The forms in use in the department are specified in Hanson, *Death Duties*, 4th ed., p. 84.

[*Authorities*.—See authorities cited in article ACCOUNT DUTY, vol. i. p. 71; also, in addition to those cited in above article, Iely and Craies, *Finance Act*, 1894; Harman, *Finance Act*, 1894; Munro, *Finance Act*, 1894.]

**Death, Proof of.**—There is no distinction between the mode of proving a death for the purposes of civil and criminal proceedings except that upon a charge of murder or manslaughter it is regarded as unsafe to permit conviction without proof that the dead body of the person said to have been killed has actually been found and identified. This has been said to be an established rule (Best on *Evidence*, 7th ed., 400–404), but appears to be a rule of caution rather than of law or evidence, like that as to evidence of accomplices; and such proof is not absolutely essential (*Makins v. A.-G. for N. S. W.*, [1894] App. Cas. 57), and where the evidence of the commission of the offence is direct, and not merely circumstantial, is dispensed with (*R. v. Hindmarsh*, 1792, 2 Leach Cr. Cas. 569). The rule is usually described as that excluding presumptive evidence of the *corpus delicti*, and “before identified.”

1. Direct proof of death is given by calling a person present at the death, or who has seen and can identify the body of the deceased (Taylor on *Evidence*, 8th ed., s. 416). Such proof is not primary in the sense that inability to prove it must be shown before the next mode of proof is admitted, but, in such a case, is direct as opposed to collateral.

2. Collateral proof of death is given by proof of an entry in a register of deaths or burials (or other public document) of the death or burial of the person alleged to be deceased.

*Deaths in England and Wales.*—Entries in parochial registers of deaths or burials kept by or under the control of the clergy of the Church of England are proved by production (1) of the register itself from the proper custody; (2) of an examined copy of the entry; (3) of a copy certified by the person to whose custody the original is intrusted.

Entries in registers of burials kept under the Register of Burials Act, 1864 (27 & 28 Vict. c. 97), are proved by the production of the original or properly certified copies.

Entries in non-parochial registers which have been deposited in the General Register House under 3 & 4 Vict. c. 92, and 21 & 22 Vict. c. 25, are, by the Acts, declared to be there in proper legal custody, and are proved (1) by production of the original by the Registrar-General (3 & 4 Vict. c. 92, s. 6); (2) by extracts purporting to be stamped with the seal of the Registrar-General's Office, and describing the register from which they are taken (3 & 4 Vict. c. 92, s. 9). In either case, notice of intention to use the register or extract must be given in sufficient time to enable the other side to inspect the original (3 & 4 Vict. c. 92, ss. 10–16). In criminal cases, until 1851, it was necessary to produce the original (3 & 4 Vict. c. 92, s. 17), but under 14 & 15 Vict. c. 99, s. 14, in such cases the entry can be also proved (a) by an examined copy, or (b) by a copy signed and certified as a true copy by the officer to whose custody the original is intrusted, i.e. apparently by the Registrar-General.

Where the death purports to have been registered over three months after its date, the certificate must be certified, if within twelve months of the date, by the superintendent registrar as well as the district registrar; if over twelve months thereafter, must purport to be signed by the Registrar-General.

Entries in registers of deaths kept under the Births and Deaths Registration Acts are proved by production (1) of the original register from the proper custody, i.e. the General Register House or the office of the registrar of the district to which the book relates; (2) of a certified copy, purporting to be sealed or stamped with the seal of the General Register Office (6 & 7 Will. IV. c. 86, s. 38), of a copy certified by a district registrar, coupled with

a certificate that the original register is in his lawful custody (14 & 15 Vict. c. 99, s. 14; *R. v. Weaver*, 1873, L. R. 2 C. C. R. 85). But the entry is valueless in evidence unless it purports (a) to be signed by a person professing to be the informant, and to be a person required by law to give information of death, or (b) to be made on a coroner's certificate, or (c) to be made in pursuance of the statute law as to the registration of deaths occurring at sea (37 & 38 Vict. c. 88, s. 38; 57 & 58 Vict. c. 60, s. 254). See DEATH, REGISTRATION OF.

Proof of death of a seaman on a ship in the Royal Navy may be given by producing the muster books of the navy office, with the entry D.D. (Discharged Dead) against the name of the deceased, and the authentication of the clerk who signed it (*R. v. Rhodes*, 1742, Leach, 23; Taylor, 8th ed., s. 1776).

Entries of the fact of a burial in books of the Church of England are, as public documents, proved either by verified copies (52 Geo. III. c. 146, ss. 6, 7), or by examined copies, or by production of the original entries from the proper custody.

As to certified copies of entries of deaths purporting to be sealed or stamped with the seal of the office of the Registrar-General, see Roscoe, *Cr. Ev.*, 10th ed., 175; Archbold, *Cr. Pl.*, 21st ed., 301; Taylor, 8th ed., ss. 198, 416.

Entries in registers of deaths or burials are *prima facie* but not conclusive evidence of the fact of the death recorded, and the other details required by law to be recorded, subject to identification of the person entered as dead or buried with the person whose death is in question, but are not evidence of matters voluntarily stated therein (Taylor, 8th ed., s. 1776).

A grant of letters of administration is not conclusive in any but the granting Court that the intestate is dead (Taylor, 8th ed., s. 1677), though it may raise a strong presumption of death (*In re Spenceley*, [1892] Prob. 255).

*Deaths outside England and Wales.*—Deaths outside England and Wales and not on a British ship, are proved either by primary evidence or by production of the originals or certified extracts of entries kept under public authority, if the entries relate to matters properly and regularly recorded in the original document (*Lyell v. Kennedy*, 1889, 14 App. Cas. 437). Where the original cannot lawfully be removed from the country under whose laws it is kept, the extract is admissible. Prior to the admission of the original or extract, the law of the country must be proved as matter of fact.

*Deaths in Ireland and Scotland.*—Entries in Scotch registers of death within 17 & 18 Vict. c. 80, s. 58, are proveable by certified extracts, subject, apparently, to authentication of the signature and official character of the certifying person (Taylor, 8th ed., vol. ii. p. 1057), and entries in Irish registers in a similar way (26 & 27 Vict. c. 11, s. 5).

Deaths registered in Scotland under 17 & 18 Vict. c. 80, s. 58, may be proved in England by certified extracts from the register duly authenticated, subject, apparently, to authentication of the signature and official character of the person certifying (Taylor, 8th ed., vol. ii. p. 1057).

*Presumptive Proof.*—Where neither direct nor collateral proof of death is available, presumptive proof is admissible (Best on *Evidence*, 7th ed., s. 409; Taylor, 8th ed., s. 198). There is not in England any common law or statutory limit to the presumption of the continuance of life; but apparently on the analogy of the statutes as to bigamy and leases for lives (1 Jac. I. c. 11, s. 2; 19 Car. II. c. 6, s. 2; 24 & 25 Vict. c. 100, s. 57), the rule has been adopted that absence for seven years creates a presumption of death. In Scotland the presumption is statutory (44 & 45 Vict. c. 47). Where a person has disappeared, and no clue to his whereabouts is obtain-

able, it is frequently necessary for the purposes of bigamy cases (*R. v. Tolson*, 1889, 23 Q. B. D. 168), or succession to property, or claims on life insurance policies, to substitute presumption for direct unequivocal proof of death. As a general rule, the presumption that a person who has disappeared is dead does not arise until the lapse of seven years since he was last seen or heard of. But after the lapse of that period there is a right to look back and inquire into all the circumstances, in order to see whether the death can, with reasonable probability, be presumed to have occurred sooner (*Hickman v. Upsall*, 1876, 4 Ch. D. 144; *Rhodes v. Rhodes*, 1887, 36 Ch. D. 586). In other words, there is no presumption that the person died on the last or any prior day of the seven years (*Nepcan v. Doe*, 1847, 2 Mee. & W. 894), and the burden of proving that he died on any particular day falls on the person who claims a right for the support whereof such proof is essential (*In re Phene's Trusts*, 1869, L. R. 5 Ch. 139). Thus where a legatee has not been heard of for seven years, the persons claiming under him the benefit of the legacy must prove that he survived the testator (*In re Lewes' Trusts*, 1870, L. R. 6 Ch. 356).

Where a person is proved to have been alive and in good health at a given date, there is no presumption in law in favour of the continuance of life, but it may be legitimately inferred as a fact that the person lived some time longer.

Where a settlement *inter vivos* contains (*inter alia*) provisions in favour of a named person, there is a presumption in favour of his having been alive at the date of the settlement, which must be displaced by proof by the settlor or his representatives if they seek to set up a resulting trust (*In re Corbishley's Trusts*, 1880, 14 Ch. D. 846).

Where several persons perish by a common calamity, the English law does not, as do continental systems, adopt any presumption of survivorship or contemporaneous death on the ground of age or sex, but has recourse to the evidence of fact, if any is available, and if there be none, treats the question as insoluble (see *Wing v. Angrave*, 1860, 8 H. L. 183; *In re Alston*, [1892] Prob. 142; Best on *Evidence*, 7th ed., s. 410; Taylor, 8th ed., s. 202).

Where persons disappear under circumstances creating a strong probability of death, the Court, for the purpose of granting probate or letters of administration, does not await the lapse of seven years. Thus where a ship is missing under such circumstances as lead to the inference—a strong if not irresistible inference—of loss with all hands and passengers, the Court will act on such inference (*In re Alston*, [1892] Prob. 142), in so doing following the presumption of maritime law as to ship and cargo (Taylor, 8th ed., s. 204).

[*Authorities*.—All the principal authorities are cited in the text.]

**Death, Registration of.**—Under the Baptismal and Burial Registers Act, 1812 (52 Geo. III. c. 146), steps were taken to prescribe the form and ensure the preservation of registers of burials solemnised according to the rites of the Church of England. These registers are kept by, and are under the control of, the incumbent of the parish, or the person appointed by him, and do not pass to Parish Councils under the Local Government Act, 1894. An iron chest must be provided for their deposit (52 Geo. III. c. 146, s. 5), and copies of the entries of each year must be transmitted to the diocesan register (ss. 6, 7).

It was not until 1836 (6 & 7 Will. IV. c. 86) that registration of deaths was made a civil and national concern. By that Act the union was

substituted for the parish as the unit of registration, and the functions of registration of deaths taken away from the parish officers, ecclesiastical and civil. The general scheme of registration is dealt with under REGISTRAR-GENERAL.

The death, and cause of death, of every person dying in England or Wales after December 31, 1874, must be registered (37 & 38 Vict. c. 88, s. 9). The written authority of the Registrar-General is required for registration after twelve months from the death or from discovery of the corpse (s. 15).

Registration is effected by giving information to the registrar of the sub-district in which the death took place or the body was found. Where death took place in a house, the primary obligation to give information rests on the nearest relatives present at the death or in attendance during the last illness, or in default, on the nearest relative dwelling or being in the sub-district, or in default of relatives, on all persons present at the death and the occupier of the house in which the death took place, or in default of any such persons, the inmates of the house or the persons who cause the body to be buried.

Where the death does not take place in a house, or a corpse is found elsewhere than in a house, the responsibility to give information falls (1) on every relative of the deceased who can give the prescribed particulars; (2) on every person present at the death; (3) on any person finding or taking charge of the corpse.

The persons liable must, within five days next after that of death, give the registrar information of the particulars required to be registered, and sign the register in the registrar's presence.

The period for registration is extended to fourteen days, when a written notice of occurrence of death, with a medical certificate in the prescribed form (s. 20), is delivered to the registrar.

The registrar can register at any time before the end of a year from death or discovery of the corpse, and for this purpose make a requisition on the responsible persons for the necessary information (s. 13).

The registration is gratuitous, unless the registrar has, under written requisition, to attend at the place of death (not being a public institution) (s. 14).

When the deceased was attended by a qualified medical practitioner during his last illness, the medical man must certify on the prescribed form his opinion as to the cause of death, and give it to the person required to inform as to death, who must under penalty give it to the registrar (s. 20). This, of course, does not require a doctor to certify a cause unless he really believes he can do so. If the certificate contains statements of a defamatory character it is privileged, but if malicious, exposes the doctor to an action.

As to the duties of coroners in regard to registration, see CORONER, vol. iii. p. 429.

Except on a coroner's authority, it is as a general rule illegal to bury a corpse without production of a certificate that the registrar has registered or received the proper written notice of death; and persons who bury or perform funeral rites over a corpse without a coroner's authority or registrar's certificate, must, under penalty, notify the registrar within seven days of their action (s. 17).

The registration of deaths on public ships is regulated by sec. 37 of the Act, and of deaths on merchant vessels by sec. 254 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

Failure to give information of death, or to comply with the registrar's requisitions, entails a penalty not exceeding forty shillings, summarily recoverable (37 & 38 Vict. c. 88, s. 39); and making false statements and certificates, or forging or falsifying them, is punishable, either summarily, within six months of the offence, or on indictment, within three years of the offence (ss. 40, 46). Sec. 36 of the Forgery Act, 1861, makes it felony to tamper with the register, in a number of ways there specified at length. As to the use of the register in evidence, see DEATH, PROOF OF.

**De bene esse.**—"To take or do anything *de bene esse* is to accept or allow it as well done for the present; but, when it comes to be more fully examined or tried, to stand or fall according to the merit of the thing in its own nature" (Jacob, *Law Dict.*, s.v. *De bene esse*). In modern times it has been used chiefly with reference to the examination of old, infirm, etc., witnesses out of Court. See COMMISSION, EVIDENCE ON.

## Debenture.

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**Definition.**—Although the instruments called debentures may be described with comparative ease, a judicial *definition* of a debenture—or at any rate an accurate one—has not yet been obtained, and is perhaps not urgently required. Of course, the word "debenture" imports an acknowledgment of a debt; see the note (p. 264) to *Levy v. Abercorris Slate and Slab Co.*, 1887, 37 Ch. D. 260, and the judgments of Chitty, J., in that case, and in *Edmonds v. Blaina Furnaces Co.*, 1887, 36 Ch. D. 215. But a mere acknowledgment of a debt does not satisfy a lawyer's or a commercial man's idea of what a debenture is. He associates the term with a company of some kind, and most debentures are *securities given by companies*; but debentures are often granted by clubs, and occasionally by individuals. The word "debenture" occurs in English statutes of 1472, 1475, 1649, 1710, in the Stamp Acts, 1870 (schedule) and 1891 (schedule), the Bills of Sale Act, 1882, s. 17, the Directors Liability Act, 1890, and the Companies (Winding Up) Act, 1890, s. 4; and doubts as to the meaning of the term in some of these enactments have given rise to several judicial decisions. The instrument often is, but need not be, under seal (*British India Steam Navigation Co. v. Com. Inland Revenue*, 1881, 7 Q. B. D. 165). It is generally, on the face of it, called a debenture; but this is not necessary, even to bring the document within the class of instruments excepted from the operation of the Bills of Sale Acts (*Levy v. Abercorris Co.*, *supra*). It is generally one of a *series* of like instruments, but is not necessarily so, for a single debenture is not unusual (see *Robson v. Smith*, [1895] 1 Ch. 118; 1 Palmer, 613). An obligation or covenant to pay is generally imported (*Edmonds v. Blaina Furnaces Co.*, *supra*), and the debenture generally

contains a charge on some or all of the property of the company, being often further secured by a trust-deed (1 Palmer, 614). But unsecured debentures are still held in great numbers by Scotchmen (1 Palmer, 614), and to a small extent by Americans. (See AMERICAN SECURITIES.) It has been held that a trust-deed to cover debentures is a debenture within the Bills of Sale Act, 1882 (see *Richards v. Kidderminster Overseers*, [1896] 2 Ch. 212, 221), but the point cannot safely be regarded as settled. A debenture containing a charge is properly described as a "mortgage debenture" (*British India Co. v. Com. Inland Revenue*, *supra*).

*Modern Form of a Company Debenture.*—A definition being impracticable, it may be useful to shortly describe an ordinary limited company's debenture in a form which has met with approval.

The instrument is under the seal of the company, and on the face of it contains a covenant to pay principal and interest, a charge on all or some of the property of the company, and a statement that it is issued subject to the conditions indorsed upon it. These conditions vary with circumstances, but, taking a form which is a fair sample, the conditions state that the debenture is one of a series of a certain limited number, each for a like amount of principal, that all those of the series rank *pari passu* as a first charge, and that such charge (except as regards the property included in the trust-deed, if any) is to be a "floating security" (a term which is explained below), but so that the company is not to create any charge in priority on certain property—generally its freeholds and leaseholds. Provision is also made for registration of the debentures, the non-recognition of equities, transfers, payment of interest by warrant, the requirements to be observed in case of joint holders, acceleration of payment of principal in certain events, *e.g.* falling into arrear as to interest, and winding up, facility as to the service of notices, and the time and mode of repayment of the principal moneys secured. Power is also given to appoint a receiver, his powers being defined and provision being made as to the disposal of the moneys which come to his hands. A "majority clause" is inserted in well drawn debentures of a series, enabling a defined majority of the holders to consent to those compromises and arrangements with the company which are so frequently advisable when a change occurs in its circumstances.

*Special Circumstances.*—It has been pointed out already that the conditions vary in different cases. For instance, when there is a trust-deed, some reference to it is advisable, and many of the conditions find a place rather in the deed than in the debentures. It is obvious, too, that the provisions of a "perpetual debenture"—one which is payable only in the event of winding up or default in paying interest (1 Palmer, 630)—differ somewhat from the clauses in a "determinable debenture," *i.e.* one which is payable on the expiration of a defined period, or on being "drawn" for redemption, or after notice to pay off. "Drawing" for redemption often necessitates the insertion of most elaborate provisions, and the same remark applies when the lenders to the company are offered the benefit of a "sinking fund." Again, debentures to bearer differ materially in their provisions from registered debentures, and to some extent from those which are originally to bearer but may become finally or temporarily registered securities. Further changes are involved where one series or more of debentures have already been issued, and the company is only in a position to give a second or other *puisne* security on its assets. In short, there is no branch of company or other drafting which requires more learning, experience, and skill than the preparation of debentures.

*Power to borrow on Debentures.*—Even if the memorandum of association



of a company contains no express authority to issue debentures, a power therein, express or implied, to borrow money enables it to borrow on debentures payable at a *fixed time*, and Mr. Palmer contends with some force that in such a case debentures to bearer and perpetual debentures may lawfully be issued (1 Palmer, 640, 641).

*Charging uncalled Capital.*—But authority to borrow on a charge of the company's uncalled capital is not so readily assumed. To authorise such a charge there must be a power either in the memorandum of association or the articles of association, and a power in the articles is sufficient, although the memorandum is silent (*Jackson v. Rainford Coal Co.*, [1896] 2 Ch. 340), but such a power is of no avail if it is inconsistent with the memorandum. Where so authorised a charge on uncalled capital is perfectly valid (*In re Phoenix Bessemer Steel Co.*, 1875, 44 L. J. Ch. 683; *In re Pyle Works*, 1890, 44 Ch. D. 534; *Newton v. Anglo-Australian Investment Co.*, [1895] App. Cas. 244), and having regard to the case last cited there is room for doubting the *dictum* of Lindley, L.J., in *In re Pyle Works (supra)*, that capital which, under sec. 5 of the Companies Act, 1879 (42 & 43 Vict. c. 76), is not "capable of being called up, except in the event of and for the purposes of the company being wound up," cannot be validly charged. And the authority to borrow need not expressly refer to uncalled capital. The following powers extend to authorise such a charge: "to mortgage . . . all or any part of the company's properties and rights" (*Howard v. Patent Ivory Manufacturing Co.*, 1888, 38 Ch. D. 156); "to receive money . . . upon any security of the company, or upon the security of any property of the company" (*Newton v. Anglo-Australian, etc., Co.*, *supra*); to borrow upon mortgage of the company's freeholds, and "other property and effects" for the time being, or upon its bonds or debenture notes, or "in such other manner as the company may determine" (*Jackson v. Rainford Coal Co.*, *ubi supra*). And where the memorandum and articles are silent, the latter may by special resolution be altered so as to enable the company to charge its uncalled capital (*ibid.*).

When the power exists, care must be taken that it is duly exercised, and the uncalled capital should be actually mentioned in the charge; a charge on "the undertaking and all the property whatsoever and wheresoever, both present and future," will not, according to Chitty, J., include uncalled capital (*Streatham and General Estates Co.*, [1897] 1 Ch. 15).

*What is Borrowing.*—A company may borrow by overdrawing its banking account (*Cunliffe, Brooks, & Co. v. Blackburn, etc., Society*, 1884, 9 App. Cas. 857, 865), and its debentures are not invalidated by their being given in part payment of the consideration, payable to the vendor of the property which it is formed to acquire (*Salomon v. Salomon & Co.*, [1896] App. Cas. 22).

*Limit as to Amount.*—No statutory limit is imposed as to the amount which may be borrowed, but the articles often impose such a limit, and the borrower must see that it is not exceeded (*Chapleo v. Brunswick, etc., Society*, 1881, 6 Q. B. D. 696, 715).

*Irregularities.*—But although he is bound to take notice of the external position of the company, and scrutinise its memorandum and articles, deed of settlement, or incorporating Act (*Mahoney v. East Holyford Co.*, 1875, L. R. 7 H. L. 869), a lender to a company, if he knows nothing to the contrary, has a right to assume that all matters of internal management have been complied with (*Royal British Bank v. Turquand*, 1857, 6 El. & Bl. 327; *County Life Assurance Co.*, 1870, L. R. 5 Ch. 288, 293; *Davies v. R. Bolton & Co.*, [1894] 3 Ch. 678). And where one company is lending to

another, and the *personnel* of the directorate of each is to some extent the same, the Court is slow to infer notice of irregularities (*Hampshire Land Co.*, [1896] 2 Ch. 743).

*Negotiability.*—Debentures can be so framed as to be negotiable free from equities. There is very little judicial authority on the subject, but it is elaborately discussed in 1 Palmer, 620 *et seq.*

*Floating Charge.*—A loan to a company, especially a trading company, would be of small assistance if the security given for it were of such a nature as to hamper the company in its business operations, and the charge is therefore usually given on all the company's property, present and future, so as to operate as a "floating security"—that is to say, an equitable charge is created on the assets for the time being, which "only attaches finally on the appointment of a receiver, or on a winding up, or when the company ceases to be a going concern," in the meantime leaving "the company at liberty to deal with its assets in the ordinary course of its business, by way of sale, lease, exchange, specific mortgage, or otherwise, as may seem expedient" (1 Palmer, 631). The term "floating security" has now a well-defined meaning, and it is therefore advisable to use it either in the body or the conditions of the debenture, qualifying its operation in most cases with a proviso that the company is not to create a mortgage or charge in priority on particular assets. The Courts, however, will construe a general charge as a floating security, although the instrument does not so expressly describe itself. For instance, where mortgage debentures charged the "undertaking and all sums of money arising therefrom," they were held to have the effect which is recognised as attaching to what is now known as a floating security (*Panama, etc., Royal Mail Co.*, 1870, L. R. 5 Ch. 318). And a similar effect was given to debentures given to "bind" the company "and all their estate, property, and effects" (*Florence Land and Public Works Co.*, 1878, 10 Ch. D. 530), and to instruments which purported to "bind" the company "and their real and personal estate" (*Colonial Trusts Corporation*, 1879, 15 Ch. D. 465). In the case last cited the term "floating security" is used by Jessel, M. R.

The general effect of a floating security is stated above. As to its effect in case of a subsequent charge on a specific asset, see *Hamilton's Windsor Ironworks*, 1879, 12 Ch. D. 707; on a subsequent deposit of title-deeds, see *Wheatley v. Silkstone Coal Co.*, 1885, 29 Ch. D. 715; as regards the application of the company's money in payment of its debts, see *Willmott v. London Celluloid Co.*, 1886, 34 Ch. D. 147; where a garnishee order has been obtained, see *Robson v. Smith*, [1895] 2 Ch. 118; as to seizure by the sheriff under an execution, see *Taunton v. Sheriff of Warwickshire*, [1895] 2 Ch. 319. But the subsequent dealing with the assets charged, to give a better title than that of the debenture-holder, must be in the ordinary course of business (as to which, see *Willmott v. London Celluloid Co.*, *ubi supra*; *Hubbock v. Helms*, 1887, 56 L. T. 232), except where there is a disposition to a person who takes without notice of the debentures, and obtains the legal estate (*English and Scottish, etc., Trust v. Brunton*, [1892] 2 Q. B. 1, and other cases cited, 2 Palmer, 403). The debentures remain a floating security, although they have become enforceable, till the holders take some step to enforce them, and prevent the company from dealing with the property charged (*Government's Stock, etc., Co. v. Manila Ry. Co.*, [1897] App. Cas. 81). The mortgagor is a "trustee of his business for the purpose of his security. But the trust is to remain dormant until the mortgagee calls it into operation" (per Lord Macnaghten in *Tailby v. Official Receiver*, 1888, 13 App. Cas. 523, 541).

Attention has already been called to the ordinary conditions in debentures, that notwithstanding a day is fixed for repayment of the principal, it is to become immediately payable in case of default for a certain period in payment of interest, or in the event of a winding up. Similar conditions existed in the case, already referred to, of *Government's Stock, etc., Co. v. Manila Rwy. Co.* The interest had fallen into arrear for the prescribed time, but before the debenture-holders took steps to enforce their floating charge the company mortgaged specific assets, and Lord Macnaghten thus states the law applicable in the circumstances: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default. In the present case it was intended that the right of intervention on the part of the debenture-holders should be suspended for a time after default . . . As I understand it, 'notwithstanding the right of the debenture-holders under the said charge,' the company should be at liberty to carry on their business for the prescribed period, unless there is a winding up in the meantime. During the period of grace or until there is a winding up, the company are to be free to carry on their business; they are to carry it on as of right. When that period comes to an end, the charge will have its ordinary effect. Thenceforward so long as the default lasts the business will be carried on, not as of right, but by the sufferance of the debenture-holders and at their mercy" ([1897] App. Cas. 86). And Jessel, M. R., said, in 1878: "If you read it as making a charge only to this extent, subject to the powers of the directors whilst they are carrying on the business, then, if they make default in payment of the principal or interest, a creditor can apply to a Court of justice for a receiver and stop them from going on; but subject to that they carry on their business as usual, leaving the creditor to his remedy in case of default or in case of a total winding up" (*Florence Land, etc., Co.* 10 Ch. D. 530, 541); and he adhered to this ruling in *Moor v. Anglo-Italian Bank*, 1879, 10 Ch. D. 681, 687. Romer, J., speaking of these debentures, said: "They constitute what is called a 'floating security'—that is to say, they allow the company to deal with its assets in the ordinary course of its business until the company is wound up, or stops business, or a receiver is appointed at the instance of the debenture-holders" (*Robson v. Smith, ubi supra*).

By the Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), certain debts have priority over the debts of debenture-holders who are secured by a floating charge (*q.v.*).

#### Registration—

By sec. 43 of the Companies Act, 1902, "every limited company under this Act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge. If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry shall incur a penalty not exceeding fifty pounds. The register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is

refused any officer of the company refusing the same, and every director and manager of the company authorising or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding five pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers . . . may by order compel an immediate inspection of the register."

But the omission to register debentures does not invalidate them (*Wright v. Horton*, 1887, 12 App. Cas. 371). The right to inspect includes the right to take copies (*Nelson v. Anglo-American, etc., Co.*, [1897] 1 Ch. 130).

*When a Bill of Sale.*—See article BILLS OF SALE, vol. ii. p. 132.

*Enforcing the Security—Acceleration of Remedy.*—Notwithstanding the company has made no default in payment of principal or interest—if the time for payment of either has not arrived—"the moment the company comes to be wound up and the property has to be realised, that moment the rights of [the debenture-holders] attach" (*Panama, etc., Co.*, 1870, L. R. 5 Ch. 318, 323). A debenture-holder may therefore, although there has been no default, commence an action for the appointment of a receiver and to enforce his security on the day on which a resolution for voluntary winding up is passed (*Hodson v. Tea Co.*, 1880, 14 Ch. D. 859). If there has been a default in payment of interest, although the debenture contains no provision making the principal money then to become payable, an action may be at once commenced (*Wallace v. Universal, etc., Co.*, [1894] 2 Ch. 547). It is probable that a winding-up petition had been filed before the writ was issued in that case, but all the reports of the case are silent on this point. A winding-up order was made before the case was heard.

If the security is shown to be in jeopardy, although no default has been made in payment even of interest, the Court will appoint a receiver, and has done so after a winding-up petition has been filed, but where no order thereon has been made, or resolution for winding up has been passed (*McMahon v. North Kent Ironworks Co.*, [1891] 2 Ch. 148).

*Action on behalf of Holders.*—The writ must be intitled in all cases in the matter of the particular company, and if the company is being *compulsorily* wound up in the High Court, the action must be assigned to the judge having jurisdiction in the matter of the winding up (Practice Masters' Rule, 26th Nov. 1895). For forms of writs and statements of claim, see 2 Palmer, 414-416.

Foreclosure may be obtained in an action commenced by originating summons (*Oldrey v. Union Works*, W. N., 1895, 77); and, as a rule, foreclosure is the remedy available where there are mortgage debentures which are not secured by a trust-deed, but where there is a trust-deed it is not generally available (2 Palmer, 407), the claim in that case being for declaration of a charge, execution of the trusts, an account, and that the charge may be enforced by sale. There are also difficulties, even where there is no trust-deed, in obtaining foreclosure when some of the debenture-holders are out of the jurisdiction, or do not concur (*Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511).

*Plaintiff.*—Until, but not after, judgment, a plaintiff suing on behalf of the debenture-holders is *dominus litis*, and may compromise or abandon the proceedings (2 Palmer, 407). Dissenting debenture-holders may apply to have one of their number added as a defendant (*ibid.*).

*Defendants.*—The company will be made defendants, and also any other incumbancers on the same property, as in the case of proceedings to enforce ordinary mortgages. Where there is a trust-deed, the trustees must also be joined as defendants.

It was held in *Francis v. Harrison*, 1889, 43 Ch. D. 183, that, a puisne mortgagee who was a trustee for beneficial owners of the mortgage moneys, did not—at any rate where he was insolvent—represent his beneficiaries in a foreclosure action brought by a prior incumbrancer; but by R. S. C. 1883, Order 16, r. 1 (as amended by r. 4 of Nov. 1893), trustees in such a case now represent their beneficiaries. Where there are no trustees and debenture-holders are puisne incumbrancers, they must all be made parties if foreclosure is sought against them. It is not sufficient to make some of them parties as representing the whole under Order 16, r. 9 (*Griffith v. Pound*, 1890, 45 Ch. D. 553). But whether there is or is not a trust-deed, if there is a charge, and an action is brought on behalf of the debenture-holders to enforce it, the judge “may direct a sale before judgment, and also after judgment, before all the persons interested are ascertained, whether served or not” (Order 51, r. 1 (b), Nov. 1893).

Where a company is being wound up compulsorily or under supervision, and it is a necessary party, the leave of the Court must be obtained before proceedings are commenced against it, and if the winding up has already commenced, liberty to proceed must be obtained, but in either case leave will be given very much as of course (2 Palmer, 335, 338, 409).

*Receivers.*—In many cases the debenture-holders have an express power to appoint a receiver under their debentures; and they may exercise the power although a winding-up order has been made (*Henry Pound, Son, and Hutchins*, 1889, 42 Ch. D. 402). And the Court will not displace the receiver by the liquidator (*ibid.*; *Joshua Stubbs Limited*, [1891] 1 Ch. 475), although the receiver, if appointed by the parties, should apply to the Court for leave to take possession if he has not done so before the winding-up order was made. And where there is no power for the parties to appoint a receiver, the debenture-holders, if they have a charge, have a right to have a receiver appointed by the Court (*Perry v. Oriental Hotels Co.*, 1870, L. R. 5 Ch. 420; *McMahon v. North Kent Ironworks Co.*, [1891] 2 Ch. 148).

But if the parties come to the Court for the appointment of a receiver they cannot insist on their own nominee being appointed, or even being retained in office, as against the official receiver or liquidator (*Joshua Stubbs Limited*, *ubi supra*; *British Linen Co. v. South American, etc., Co.*, [1894] 1 Ch. 108).

Sec. 4 (6) of the Companies (Winding-up) Act, 1890, expressly provides that “where an application is made to the Court to appoint a receiver on behalf of the debenture-holders or other creditors of the company, the official receiver may be appointed,” and the Court frequently prefers to appoint the liquidator as receiver, in respect of all or some of the assets; see the two cases last cited. But where the winding up is purely voluntary, no preference as to appointment as receiver is given to the liquidator over the nominee of the secured creditors (*Boyle v. Bettws Llantwit Colliery Co.*, 1876, 2 Ch. D. 726).

As to making calls on shares when the uncalled capital is charged and there is a winding up, see *Fowler v. Broad's Patent, etc., Co.*, [1893] 1 Ch. 724).

*Receiver and Manager.*—Where the debentures are charged on a going concern the Court “has increasingly of late years, at the instance of [debenture-holders], appointed not merely receivers but managers” (*Reid v. Explosives Co.*, 1887, 19 Q. B. D. 264). There is no doubt whatever as to the jurisdiction to appoint receivers and managers in ordinary cases (see 2 Palmer, 410). But where what is charged is in the nature of a public undertaking, and there is no power to sell that undertaking, only a receiver, and not a manager,

can be appointed (*Gardner v. L. C. and D. Ry. Co.*, 1867, L. R. 2 Ch. 201; *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36). But a receiver, and, if necessary, a manager, may in the case of a railway company be appointed under sec. 4 of the Railway Companies Act, 1867 (and see *Manchester and Milford Ry. Co.*, 1880, 14 Ch. D. 645; *Mersey Ry. Co.*, 1888, 37 Ch. D. 610). A receiver in a debenture-holders' action may, in case of emergency, be empowered by the Court to borrow money as a first charge on the undertaking in priority to the debentures (*Greenwood v. Algeciras (Gibraltar) Ry. Co.*, [1894] 2 Ch. 205), such securities having a resemblance to receivers' certificates in the United States. [See AMERICAN SECURITIES.]

As to the receiver's right to indemnity in England in priority to the charges created by these "prior-lien" securities, see *Strapp v. Bull*, [1895] 2 Ch. 1; and with reference to the point of time from which a receiver appointed by the Court is deemed to be in possession, see *Morrison v. Skerne Ironworks Co.*, 1889, 60 L. T. 588; *Edwards v. Edwards*, 1877, 2 Ch. D. 291; *Marriage Neave & Co.*, [1896] 2 Ch. 663, 671.

"When a receiver is appointed by the Court to carry on a business, he accepts the appointment on the terms that he will be personally responsible to the creditors of the business, whilst he will be indemnified out of the estate" (per Rigby, L.J., *Bent v. Bull*, [1894] 1 Q. B. 265, 275). As to the liability of a receiver appointed by the trustees of a debenture trust-deed, see *D. Owen & Co. v. Cronk*, [1895] 1 Q. B. 265, and *Gaskell v. Gosling*, [1896] 1 Q. B. 669. The case last cited has been appealed, and the decision has been reversed in the House of Lords.

*Declaration of Charge.*—At the hearing of the action the practice is to declare that the debenture-holders are entitled to a charge (*Marwick v. Lord Thurlow*, [1895] 1 Ch. 776), but Vaughan Williams, J., before whom many of these actions come, will not make such a declaration in a short cause on motion for judgment unless the company, by its liquidator, appears and consents. For forms of judgment in debenture actions, see 2 Palmer, 417 *et seq.*, and as to those by Vaughan Williams, J., see particularly *ibid.*, Form 457, and the Notes to Form 459.

*Notice of Judgment.*—As to service of notice of judgments and orders, see R. S. C., 1883, Order 16, r. 40; Order 55, rr. 35 and 35*a* (Nov. 1, 1893), but directions have lately been issued by the Chancery judges to their masters, that "in ordinary cases the judgment in debenture-holders' actions should *not* be served on the debenture-holders, but they should have notice given to them by circular or letter, or by advertisement, if the case so require, full discretion being reserved to serve notice of the judgment formally if thought advisable."

*Winding up.*—As to the acceleration of debenture-holders' remedies by a winding up taking place, see *supra*. A winding-up order does not prevent a debenture-holder from bringing an action to realise his security (*Longdendale Cotton Spinning Co.*, 1878, 8 Ch. D. 150; *Henry Pound, Son, & Hutchins*, 1889, 42 Ch. D. 402); for he is not bound to enforce his rights in the winding up (*Lloyd v. David Lloyd & Co.*, 1877, 6 Ch. D. 339). But where a compulsory or supervision order has been made, the debenture or stock holders, if all concur, can have their securities realised on summons in the liquidation, or they can agree to realisation by the liquidator and payment off out of the proceeds (2 Palmer, 409). And the holder of a debenture may petition for a winding-up order (*Moor v. Anglo-Italian Bank*, 1879, 10 Ch. D. 681), even when his debenture is payable to bearer (*Olathe Silver-Mining Co.*, 1884, 27 Ch. D. 278).

If debenture-holders prove in a winding up their rights are different when the company is solvent from those which they have when it is insolvent. In the former case they prove for principal and interest without first valuing their security (*Kellock's case*, 1868, L. R. 3 Ch. 769); "and they can hold their securities until redemption in full by payment of principal, interest, and costs, or they can realise the same by virtue of any power of sale, and can then go in and prove, or they can apply to the Court to realise their security, or with the leave of the Court (s. 87 of 1862) bring an action to enforce their securities" (2 Palmer, 408). But "in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt" (Judicature Act, 1875, s. 10). The effect of these rules, shortly stated, is that the debenture-holder is a secured creditor. See article COMPANIES, *Secured Creditors*, vol. iii. p. 227; and see *Ex parte National, etc., Bank, In re Newton*, [1896] 2 Q. B. 403.

But as debentures or debenture stock may be issued at a discount, the holders can receive dividends on the whole amounts of the face value *pari passu* with other creditors until, when they are mortgagees of the debentures or stock, their mortgage moneys have been paid in full (*Regent's Canal Ironworks Co.*, 1876, 3 Ch. D. 43; *Robinson v. Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841).

*Securities of Railway and other Statutory Companies.*—The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), applies to "every joint-stock company which shall by any Act which shall hereafter be passed be incorporated for the purpose of carrying on any undertaking" (s. 1); and by sec. 38, "if the company be authorised by the special Act"—which is "any Act which shall be hereafter passed incorporating a joint-stock company for the purpose of carrying on any undertaking" (s. 2)—"to borrow money on mortgage or bond, it shall be lawful for them, subject to the restrictions contained in the special Act, to borrow on mortgage or bond such sums of money as shall from time to time by an order of a general meeting of the company be authorised to be borrowed, not exceeding in the whole the sum prescribed by the special Act, and for securing the repayment of the money so borrowed, with interest, to mortgage the undertaking and the future calls on the shareholders, or to give bonds in manner hereinafter mentioned."

By sec. 41 "every such mortgage deed or bond may be according to the form in the schedule (C) or (D) to this Act annexed, or to the like effect." These mortgages to some extent resemble debentures, for by sec. 42 "the respective mortgagees shall be entitled one with another to their respective proportions of the tolls, sums, and premises comprised in such mortgages, and of the future calls payable by the shareholders, if comprised therein, according to the respective sums in such mortgages mentioned to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference one above another by reason of priority of the date of any such mortgage, or of the meeting at which the same was authorised." See further as to these loans, secs. 39–41, 43–55. As to converting loans into capital, see secs. 56 *et seq.*

Part III. of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), comprises secs. 22–35. Sec. 22, as amended by sec. 1 of the Companies Clauses Act, 1869, provides that "where any company, incorporated either

before or after the passing of this Act for the purpose of carrying on any undertaking, is authorised by any special Act hereafter passed and incorporating this part of the Act to create and issue debenture stock,—then and in every such case the company, with the sanction of such proportion of the votes of the shareholders and stockholders entitled to vote in that behalf at meetings of the company present (personally or by proxy) at a meeting of the company specially convened for the purpose, as is prescribed in the special Act, and if no proportion is prescribed, then of three-fifths of such votes, may from time to time raise all or any part of the money which for the time being they have raised, or are authorised to raise, on mortgage or bond, by the creation and issue, at such times, in such amounts and manner, on such terms, subject to such conditions, and with such rights and privileges as the company thinks fit, of stock to be called 'debenture stock,' instead of and to the same amount as the whole or any part of the money which may for the time being be owing by the company on mortgage or bond, or which they may from time to time have power to raise on mortgage or bond, and may attach to the stock so created such fixed and perpetual preferential interest, payable half-yearly or otherwise, and commencing at once, or at any future time or times, when and as the debenture stock is issued, or otherwise, as the company thinks fit."

The restriction as to *rate* of interest in the future was abolished by sec. 1 of the Act of 1869, but see sec. 2 of that Act as to the rate of interest on stock then already authorised.

By sec. 3 of the Act of 1869 "*any company having power to raise money on mortgage or bond by virtue of any Act of Parliament, but not having power to create and issue debenture stock, may create and issue debenture stock subject to the provisions of Part III. of the Act of 1863,*" which as amended is to be "*deemed to be incorporated with the special Act of every such company.*" By sec. 4 of the Act of 1869 "*money borrowed by a company for the purpose of paying off and duly applied in paying off bonds or mortgages of the company given or made under the statutory powers of the company shall, so far as the same is applied, be deemed money borrowed within and not in excess of such statutory powers.*" This presumably means that if the limit of borrowing is £20,000, and the company owes £15,000 on bonds or mortgages, its limit for issue of debentures is not £5000 but £20,000, provided that £15,000 of the £20,000 is applied in paying off the mortgages.

By secs. 23 and 24 of the Act of 1863 the stock, with interest, is a charge on the undertaking prior to shares or stock, is transferable, and has the incidents of personal estate; and the interest on the debenture stock has priority over the dividends or interest on ordinary, preference, or guaranteed shares or stock, and *rank next to the interest on mortgages or bonds legally granted before the creation of such stock*; but the debenture stockholders are not *inter se* entitled to any preference or priority.

By sec. 30 of the Act of 1863 "*nothing herein or in the special Act authorising the issue of the debenture stock contained shall in any way affect any mortgage or bond at any time legally granted by the company before the creation of such stock, or any power of the company to raise money on mortgage or bond; but the holders of all such mortgages and bonds shall, during the continuance thereof respectively, be entitled to the same priorities, rights, and privileges in all respects as they would have been entitled to if the special Act authorising the issue of debenture stock had not been passed.*"

By sec. 32 "*money raised by debenture stock shall be applied exclus-*



ively either in paying off money due by the company on mortgage or bond, or else for the purposes to which the same money would be applicable if it were raised on mortgage or bond instead of debenture stock." Inasmuch as by sec. 34 "the powers of borrowing and re-borrowing by the company" are, "to the extent of money raised by the issue of debenture stock," "extinguished," it is often more convenient to commence borrowing on mortgage or bond, and not by issuing debenture stock.

By sec. 28 of the Act of 1863 provision is made for registration of the debenture stock, and the names and addresses of the stockholders for the time being, and for the free inspection of the register by "every mortgagee, bondholder, debenture stockholder, shareholder, and stockholder" of the company. The right to inspect includes the right to take copies (*Mutter v. Eastern and Midlands Rwy. Co.*, 1888, 38 Ch. D. 92).

By sec. 29 "the company shall deliver to every holder of debenture stock a certificate stating the amount held by him; and all regulations or provisions for the time being applicable to certificates of shares in the capital of the company shall apply, *mutatis mutandis*, to certificates of debenture stock."

Sec. 25 enables any one or more of the holders of debenture stock to the amount mentioned in the special Act, or if no amount is prescribed, to an amount equal to one-tenth of the sum which the company is for the time being authorised to raise by mortgage, by bond, and by debenture stock, or of the amount of £10,000, whichever of the two last-mentioned sums is the smaller (without prejudice to the right to sue for interest), to require the appointment of a receiver or judicial factor whenever the interest is in arrear for thirty days.

Sec. 26 says how the appointment of a receiver or judicial factor is to be made, and empowers him to receive the tolls or sums liable to payment of interest, and to distribute the same rateably in payment of it among the stockholders, after making provision for payment of the interest on the company's mortgages or bonds.

Sec. 27 provides for the recovery of arrears of interest by action or suit.

Sec. 35 applies Part III. of the Act to mortgage preference stock and to funded debt.

The provisions above referred to apply, of course, to railway companies, to the borrowing by which, however, certain further enactments have application. The Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120), and the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), give companies the means of obtaining new capital, and executing new works with the sanction only of a Board of Trade certificate, with power to raise additional capital "partly by borrowing on mortgage . . . and with power to create and issue debenture stock," but under certain restrictions mentioned in the Acts (see Manson on *Debentures*, 211).

The Railway Securities Act, 1866 (29 & 30 Vict. c. 108), also contains important provisions which can only be referred to here. The name of an officer of the company authorised to sign instruments must be registered. Loan capital accounts are to be made out, and filed with the Registrar of Joint Stock Companies, and to be open to inspection by shareholders and others. A statement in a prescribed form is to be filed with the same Registrar before borrowing on mortgage or bond, or issuing debenture stock under future statutes. Sec. 14 requires a declaration in a prescribed form to be placed on every mortgage deed, bond, and debenture stock certificate. But by sec. 18 "nothing in this Act, or in any account, statement, or declaration under it, shall affect in any action or suit any question respecting

any loan, debt, liability, mortgage, bond, or debenture stock as between a railway company or any director or officer of a railway company on the one side, and any person or class of persons on the other side."

The following provisions of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), may also be referred to, namely, sec. 4 (as amended by 38 & 39 Vict. c. 31), containing restrictions on execution against rolling stock and other personal property of the company, but providing for the appointment of a receiver and of a manager; sec. 23, as to the priority of mortgages, bonds, and debenture stock over other debts (see *Hull, etc., Ry. Co.*, 1888, 40 Ch. D. 119); secs. 24 & 25, which are to the same effect as secs. 1 and 2 of the Companies Clauses Act, 1869; and sec. 26, which provides that "moneys borrowed by a company for the purpose of paying off, and duly applied in paying off, bonds or mortgages of the company, given or made under the statutory powers of the company, shall, so far as the same is applied, be deemed money borrowed within and not in excess of such statutory powers."

*Municipal Corporations, etc.*—See also article BORROWING POWERS. Money may be borrowed by municipal corporations and County Councils on the security of debentures or debenture stock; as to which, see *Mans.* n, 222.

[*Authorities.*—1 Palmer, *Company Precedents*, 6th (the latest) ed.; 2 Palmer, *Company Precedents*, 7th ed.; Manson on *Debentures*; Chitty, *Statutes, tit. Company.*]

**Debet et detinet.**—These were the descriptive words formerly used in a writ and declaration to denote that the cause of action sued on was for debt (see DEBT, ACTION OF). The action of debt originally lay not only to enforce the payment of debts or liquidated sums of money due under contracts (*ibid.*), but also to recover specific goods improperly detained (1 Petersdorff's *Abridgment*, p. 138 n.; Gilbert on *The Action of Debt*, pp. 359, 400; and see 1 Chitty on *Pleading*, 7th ed., p. 122). Where the action was for the recovery of money, it was brought in the *debet* and *detinet*, but, if for goods, it was brought in the *detinet* only (Comyn's *Digest*, "Pleader," 2 W. 8; Bac. *Abr.* "Debt," F.).

**Debet et solet.**—These words were used in certain old forms of writs to denote that the plaintiff was suing to enforce a right which he himself, and his ancestors before him, had been in the usual enjoyment of. An instance of a form of this kind will be found in the old writ *secta ad molendinum*, which was issued where there had been a breach by the defendant of a usage to grind corn at a certain mill of the plaintiff, and thereupon commanded the defendant that justly and without delay he do his suit to the mill which *he oweth to it, and hath been used to do*, etc. (F. N. B. 122 M.).

**Debt, Action of.**—This was one of the old forms of personal actions which are now practically abolished as distinctive forms of action. It lay to recover a sum certain, or capable of being reduced to certainty by calculation, payable in respect of a direct and immediate liability by a debtor to a creditor (see First Report of Common Law Commissioners, 1851, p. 31). It was maintainable for the recovery of money due upon simple

contracts, express or implied, and upon contracts under seal and of record, and upon statutes by a party aggrieved or a common informer (1 Chitty on *Pleading*, 7th ed., p. 121; 1 Selwyn's *N. P.*, 13th ed., 484). Formerly the declaration in debt, which was framed upon the terms of the original writ, charged the defendant in what was called the *debet et detinet*, because where the party contracting refused to pay the price agreed upon by the contract, he was a debtor for such price, and guilty of an unjust detention (see Gilbert on the *Action of Debt*, p. 400). The Common Law Procedure Act, 1852, however, materially simplified the form of pleading, and since the coming into operation of that Act, the *detinet*, as regards actions of debt, has entirely dropped out of the plaintiff's statement of his cause of action. An action of debt also formerly lay in the *detinet* for the recovery of goods contracted to be delivered (see *DEBET ET DETINET*). In the case of simple contract debts, certain concise forms of counts were generally used which were described as "*common counts*" or "*common indebitatus counts*" (see *COUNT IN DECLARATION*). Those most frequently employed were for money payable for goods sold and delivered, for goods bargained and sold, for work done, for money lent, for money paid, for money received, for interest and upon accounts stated (see Bullen and Leake, *Precedents of Pleading*, 3rd ed., p. 35). Though damages might be claimed in an action of debt, they were in general nominal only, and the judgment was final in the first instance (*Ibid.*, p. 36; 1 Chitty on *Pleading*, p. 128). As to the pleas formerly in use in actions of debt, see *NIL DEBET*; *NUNQUAM INDEBITATUS*.

**Debt, Claim, or Demand.**—It was decided in *R. v. Stepney Union*, 1874, L. R. 9 Q. B. 383, that each weekly sum ordered by justices to be paid by guardians for the maintenance of a criminal pauper lunatic was a "debt, claim, or demand" within the meaning of sec. 1 of the Poor Law (Payment of Debts) Act, 1859, and must be paid, or proceedings commenced to enforce the payment, within the time limited by that section, or the recovery would be barred. In *West Ham Union Guardians v. St. Matthew, Bethnal Green*, [1896] App. Cas. 477, it was held that an order of the House of Lords for payment of the costs of the appeal without specifying the amount did not constitute a "debt, claim, or demand" within the same section until the amount had been certified by the clerk of the Parliaments.

**Debt or Liability.**—Future payments of alimony do not constitute a "debt or liability" within the meaning of sec. 37 of the Bankruptcy Act, 1883; they are not therefore provable in the bankruptcy (*Linton v. Linton*, 1885, 15 Q. B. D. 239; see also *In re Hawkins, Ex parte Hawkins*, [1894] 1 Q. B. 25).

By giving a new bill in renewal of an old one a new debt is incurred, and such new debt is a "debt or liability" within the meaning of sec. 13, subs. (1) of the Debtors Act, 1869, which makes it a misdemeanour for a person in incurring any debt or liability to obtain credit under false pretences or by means of any other fraud (*R. v. Pierce*, 1887, 56 L. J. M. C. 85).

**Debtors Act, 1869.**—This important statute, which came into operation on 1st January 1870, is divided into three parts:—

*Part I.*, which may be said to have introduced a new era for innocent debtors, abolished imprisonment for debt in all cases except where default is made—(1) in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of a contract; (2) in payment of any sum recoverable summarily before justices; (3) by a trustee or person in a fiduciary capacity who is ordered by the Court to pay a sum in his possession or under his control; (4) by a solicitor in payment of costs which he has been ordered to pay for misconduct as such, or in payment of a sum which he has been ordered to pay in his character as an officer of Court; (5) in payment by a bankrupt for the benefit of his creditors of such portion of his salary or income as he has been ordered to pay; or (6) in payment of sums in respect of the payment of which orders are in the Act authorised to be made. As regards (3) and (4), the Court or judge is given a discretion as to ordering imprisonment by the amending Act of 1878; and in none of the excepted cases can imprisonment be ordered for a longer period than one year (s. 4). The Act, however, gives power to commit for a term not exceeding six weeks for non-payment of a judgment debt where it is shown to the satisfaction of the Court that the debtor either has or has had, since the date of the judgment, means to pay, and has refused or neglected to do so (s. 5) (see JUDGMENT SUMMONS). A judgment debt may be ordered to be paid by instalments (s. 5), and a fresh power to commit arises on each default in payment of an instalment (per Bovill, C.J., in *Horsnail v. Bruce*, 1873, L. R. 8 C. P. 378). A Court having bankruptcy jurisdiction may, however, instead of making an order of committal, with the consent of the judgment creditor, make a receiving order against the debtor (Bankruptcy Act, 1883, s. 103, subs. 5). Imprisonment does not operate as satisfaction of the debt (s. 5); upon payment of the debt an imprisoned debtor is entitled to his discharge (*ibid.*). Sec. 6 abolishes arrest on mesne process, but it provides that a judge of the High Court in any action in which prior to the Act the defendant might have been arrested, may make an order for the arrest and imprisonment of the defendant for any period not exceeding six months, unless and until he has sooner given security, not exceeding the amount claimed in the action, that he will not leave England without the leave of the Court, where the plaintiff in such an action establishes to the satisfaction of the judge (a) that he (the plaintiff) has a good cause of action against the defendant for £50 or upwards, (b) that there is probable cause for believing that the defendant is about to quit England, and (c) that the absence of the defendant will materially prejudice the plaintiff in the prosecution of his action. Where the action is for a penalty other than a penalty under a contract, the plaintiff need not show that he will be materially prejudiced by the absence of the defendant, and the security in this case is that any sum recovered against the defendant shall be paid, or that the defendant shall be rendered to prison (*ibid.*).

*Part II.* deals with fraudulent debtors. Sec. 11 provides that a bankrupt who commits any of the offences enumerated in the section shall be guilty of misdemeanour, and be liable to imprisonment for any time not exceeding two years, with or without hard labour. The offences enumerated are very numerous, and reference must be made to the section for details; and see BANKRUPTCY, vol. i. p. 521; shortly, they relate to fraudulent dealings by a bankrupt with his property, making false entries in his books, not making full disclosures to the trustee, obtaining credit by false pretences. Sec. 12 makes it felony for a bankrupt to abscond with any property that should be divided among his creditors; and

the following section makes it a misdemeanour, punishable with imprisonment for any period not exceeding one year, with or without hard labour, for *any person* (1) to obtain credit under false pretences, or by means of any other fraud; (2) to make or cause to be made any gift, delivery, or transfer of, or any charge on, his property, with intent to defraud any of his creditors; (3) to conceal or remove, with the like intent, any of his property after, or within two months before, the date of any unsatisfied judgment against him. The making of a false claim by any creditor in a bankruptcy wilfully and with intent to defraud is subject to a similar penalty (s. 14). Every misdemeanour under this part of the Act is an offence within the Vexatious Indictments Act (s. 18), and all offences under the Act are triable at Quarter Sessions (s. 20).

*Part III.* deals with warrants of attorney, cognovits, and orders for judgment. It is provided that warrants of attorney and cognovits shall not be of force unless executed in the presence of a solicitor (ss. 24, 25), and filed in the Queen's Bench Division within twenty-one days next after their execution (s. 26). A judge's order to enter up judgment must similarly be filed (s. 27).

The Act does not bind the Crown (see *In re Smith*, 1876, 2 Ex. D. 47).

**Debtor's Summons.**—A debtor's summons was the equivalent under the Bankruptcy Act of 1869 of a bankruptcy notice. As to which, see vol. i. p. 489.

**Decelt, Action for.**—See COMPANY (vol. iii. p. 186) and FRAUD.

**Decelve or Impose.**—See CHEAT; FALSE PRETENCES; FRAUD.

**Decennary** — Another term for a tithing (*q.v.*). Originally it seems to have been the association of ten freemen for the conservation of peace and execution of justice; afterwards the term was applied to the territorial division which was protected by the ten men. The decennary was a subdivision of the hundred as the hundred was of the shire.

• **Deck Cargo.**—"The deck is *prima facie* an improper place for the stowage of the cargo or any part of it" (Tindal, C.J., *Gould v. Oliver*, 1840, 2 Myl. & Cr. 208); and the shipowner is not liable for loss or damage to goods carried on deck unless he has an express contract with their owner to that effect, or there is a custom to carry goods on deck so general and universal in the trade and at the port of shipment that everybody shipping goods there must be taken to know that his goods may probably be stowed on deck (Brett, M. R., *Dixon v. Roy. Ex. A. C.*, 1885, affirmed 12 App. Cas. 11, Carver, 281; and see CARGO). For the rights of an owner of deck cargo jettisoned, see AVERAGE. An underwriter of a policy of marine insurance on goods in the ordinary form is not liable for loss of or damage to goods carried on deck, unless there is a custom of trade to that effect which should be within his knowledge (*Da Costa v. Edmunds*, 1815, 4 Camp. 142; 16 R. R. 763, Lord Lyndhurst); and under a policy on cargo "on or under deck" the underwriter is not liable if the ship is only fit to encounter

ordinary rough weather with safety itself, because the deck cargo is such as may be readily jettisoned in such weather (*Daniels v. Harris*, 1874, L. R. 10 C. P. 1, Brett, J.; and see MARINE INSURANCE). A charterer of a ship is not entitled, unless the charter-party expressly so provides, to load cargo on the deck (and see *Neill v. Ridley*, 1854, 9 Ex. Rep. 677).

There are several statutory enactments with regard to deck cargo which extend the application of the common law principle. See the Merchant Shipping Act, 1894, ss. 451, 294, 85.

**Declaration of Paris.**—At the conclusion of the negotiations for the Treaty of Paris in 1856, Count Walewski, the French Plenipotentiary, proposed to the members of the Congress to terminate its work by a declaration which would constitute “a notable progress” in International Law.

The majority of the Powers represented were in favour of Count Walewski's proposals, which were adopted in the following form:—

“1. Privateering is and remains abolished.

“2. The neutral flag covers enemy's goods, with the exception of contraband of war.

“3. Neutral goods, except contraband of war, are not liable to capture under an enemy's flag.

“4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of an enemy.”

These principles are known as the Declaration of Paris (April 16, 1856). The majority included Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey. The United States, while recognising the last three principles, were unable to agree to the first on the ground that not maintaining a great navy they would be obliged in time of war to rely largely upon merchant ships commissioned by the Government as war-vessels, and that therefore the discontinuance of the practice would be entirely in favour of European Powers, whose large navies rendered them practically independent of such aid. (For a full view of the United States' contention, see Wharton's *International Law Digest*, Washington, 1886, s. 385.) Of other maritime States, Spain, Mexico, and Venezuela are the only ones who still, like the United States, hold aloof from the Declaration. An express *proviso* was agreed upon by the signatory Powers, that “the present declaration is and shall be obligatory only for and between Powers which have or shall have acceded to it.” Thus in a war between France and Mexico, the former would not be bound by the terms of the Declaration, her adversary not being a party to it.

[*Authorities.*—Calvo, *Droit International Théorique et Pratique*, s. 2544, Paris, 1888; Woolsey's *International Law*, 5th ed., 1879; Hall, *International Law*, 1896.]

**Declaration of Right.**—See BILL OF RIGHTS.

**Declaration of Title.**—The Declaration of Title Act, 1862, 25 & 26 Vict. c. 67, was designed to aid the working of the Act commonly called Lord Westbury's Act (25 & 26 Vict. c. 53), for the registration of titles to land, which was passed in the same year. At that time the opinion was

held by certain personages of great position, that the delays, difficulties, and expenses attending the practice of conveyancing might be much diminished by the introduction of a system of registration for titles, as distinguished from the registration of deeds relating to titles; which system had been previously introduced into Ireland, in connection with the operations of the Incumbered Estates Court. The main provisions of the Declaration of Title Act, 1862, may be summed up as follows:—(1) Any person claiming or having power to appoint or acquire a fee-simple in possession, whether free from, or subject to, incumbrances, and any person entitled to apply for registration with an indefeasible title under Lord Westbury's Act, may apply by petition in Chancery for a declaration of his title. (2) The title propounded by the petitioner is to be investigated in the same way as upon a decree for specific performance. (3) If the title is found to be such as the Court would force upon an unwilling purchaser, a decree *nisi* is to be made for establishing the title after a time limited for receiving objections. (4) Such notices and advertisements are to be given (particularly to neighbouring owners) and inserted as the Court may direct. (5) Any person may, within the time limited therefor, petition the Court against the making of the declaration. (6) Upon the expiration of the time limited, without any satisfactory objection having been established, the Court may finally make a declaration establishing the title, either absolutely or subject to specified restrictions. (7) Six months are given for appeal to the Court of Appeal in Chancery, and six months for appeal to the House of Lords. (8) A certificate of title is to be issued in accordance with the terms of the declaration; or the land may be parcelled into lots, with separate certificates for separate lots. (9) Such certificate entitles the holder to registration of his title under Lord Westbury's Act; or it may be used independently as a document of title in itself. (10) A petition may be presented by any person who may consider himself to be aggrieved by any such declaration, for the recall or variation thereof; and the declaration may be annulled or varied; but without prejudice to any title previously acquired under the declaration by any purchaser for valuable consideration.

This Act remains still in force, with the exception of secs. 40 and 41, and part of secs. 42 and 43, which contain certain provisions relating to general rules and fees.

It is believed that no general rules under this Act were ever issued; and the Act has been so little used in practice, that the opinion has been commonly entertained that it has never been used at all. But the cases of *In re Roberts*, W. N. 1870, p. 49; L. R. 10 Eq. 402; and *In re Keen*, V. C. M. 1873, A. 250—cited, Seton on *Decrees*, 5th ed., p. 2084, show that at least two applications to the Court have been made under its provisions.

**Declaration of Trust.**—The phrase “declaration of trust” is usually taken to include any form of words, whether spoken or written, and, if written, whether under hand only, or under seal, whereby an intention is effectually manifested, by the person or persons entitled to give effect to such intention, that certain specified property, whether real or personal, shall be held, and used or applied, by the person or persons in whom the title thereto at law is vested, for the benefit, either simply and absolutely, or in a specified and restricted manner, of some other person or persons. If the declaration of trust is simple and absolute, the *cestui que trust* has in equity precisely the same estate or interest which is vested in the trustee at law; and in such case, if under no incapacity, he may demand

to have his equitable estate or interest clothed with the legal estate or interest; by the conveyance, for example, of the legal estate in the case of real property, or by a transfer of stocks or funds passing by transfer, or by the delivery of personal chattels susceptible of manual delivery. Before the coming into operation of the Statute of Frauds, 29 Car. II. c. 3, s. 7 (24th June 1677), there existed no difference, so far as the need for writing was concerned, in respect of their declaration, between trusts of real estate and trusts of any other species of property. That enactment provided that thenceforward all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, should be manifested and proved by some writing signed by the party by law enabled to declare such trust, or by his last will in writing. The 8th section provides that the foregoing enactment shall not extend to trusts arising or resulting by implication or construction of law. The 9th section enacts that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise. The "party who is by law enabled" to declare the trust is the person for the time being entitled to the beneficial interest in the property (*Tieken v. Wood*, 1854 19 Beav. 330; *Kronheim v. Johnson*, 1877, 7 Ch. D. 60). And therefore a declaration of trust of an intended wife's lands, executed (before the Married Women's Property Acts) by the intended husband alone, cannot affect them with a separate use in her favour beyond the duration of the estate taken by the husband in her right (*Dye v. Dye*, 1884, 13 Q. B. D. 147). A declaration of trust made by an owner of property in favour of a volunteer, though he retains the property in his own hands, doing nothing to divest himself of the legal ownership, will nevertheless be enforced by the Court, provided that the declaration appears to have been intended by the person making it to be a final and irrevocable proceeding on his part, and provided that it has been communicated to the volunteer; or provided that, if it relates to a *chase in action*, it is directed to the person liable thereunder (*Thorpe v. Owen*, 1842, 5 Beav. 224; *Paterson v. Murphy*, 1853, 11 Hare, 88; *Vandenberg v. Palmer*, 1858, 4 Kay & J. 204). In those cases the volunteer was related by blood to the settlor; but this is not essential (see *Drosier v. Brereton*, 1852, 15 Beav. 221; *Morgan v. Malleon*, 1870, L. R. 10 Eq. 475). If the decision and accompanying *dictum* of Shadwell, V.C., in *Searle v. Lav*, 1846, 15 Sim. 95, may be relied on, an express declaration in favour of a volunteer, without any attempt to transfer the ownership of the property, may be more effectual than an express declaration accompanied by an ineffectual attempt to transfer the legal ownership to a separate trustee. But this proposition seems to be intrinsically doubtful, and to be opposed to the decision in *Richardson v. Richardson*, 1867, L. R. 3 Eq. 686. The last-mentioned case, and also *Morgan v. Malleon*, *supra*, were unfavourably criticised by Bacon, V.C., in *Warriner v. Rogers*, 1873, L. R. 16 Eq. 340; but in that case the declaration, though placed in the custody of the intended *cestui que trust*, was not communicated to him, being enclosed in a locked box, of which the intending settlor retained the key.

**Declaration of Use.**—In its common acceptation the phrase "declaration of use" differs in two respects from the closely analogous phrase "declaration of trust" (*q.v.*): (1) The word "use" is restricted to refer only to real estate, whereas the word "trust" is extended to all kinds of property; and (2) the word "use" was of common occurrence in times



when there existed no method by which the moral rights and claims of the *cestui que use* could be enforced, whereas the word "trust," when employed *in pari materid* with the word use, has always contained within it a necessary implication that the rights and claims of the *cestui que trust* would be enforced in Courts of Equity, and now, since the coming into operation of the Judicature Act, 1873, in Courts of Law also. Moreover, since the coming into operation of the Statute of Uses, the word "use" has been commonly restricted to denote uses which are capable of being executed into legal estates by the statute: it being generally recognised that uses of lands which, though lawful and capable of enforcement are incapable of being executed by the statute, are more conveniently comprised under the general law of trusts. Restricting the word to this sense, it has often been said that declarations of uses are within the meaning of the 7th section of the Statute of Frauds, relating to declarations of trusts, and must therefore be in writing, signed by the party enabled by law to declare the use. Some further remarks upon this opinion will be found at the end of this article. It is first to be observed that upon every occasion which can arise at the present day, permitting or rendering possible a declaration of uses, capable of being executed by the Statute of Uses, the necessity will also arise for the execution of a deed; and upon such occasions it is the universal practice to insert a declaration of the intended uses in the deed; and therefore such separate declarations are not found in practice. The necessity for the execution of a deed will appear from an enumeration of the methods by which, at the present day, a seisin can arise, upon which uses, executable as aforesaid, are capable of being grafted by declaration. These methods are as follows: (1) A feoffment, for which a deed is now necessary by 8 & 9 Vict. c. 106, s. 3; (2) a grant at the common law of things lying in grant, for which a deed is requisite; (3) a grant, by virtue of 8 & 9 Vict. c. 106, s. 2, of corporeal hereditaments, for which also a deed is necessary; (4) a release of a reversion to the tenant of the particular estate, under which is also, for this purpose, to be included the old assurance "by lease and release," for which also a deed is necessary; and (5) the assurance usually styled a covenant to stand seised to uses in consideration of blood or marriage, which implies, by its title, that a deed was employed for this purpose in the common practice, and, by the weight of authority, a deed was necessary (*Page v. Moulton*, 12 & 13 Eliz. Dy. 296 b, and authorities in marg., to which add *Gillb. Uses*, 271). It may here be observed that a bargain and sale enrolled does not come within the present scope, because there the use is raised in the bargainee by implication of law and not by declaration; but to this also a deed is rendered necessary at this day by the Statute of Enrolments. Having regard to the foregoing remarks, it will appear that the question whether uses in the present sense are within the intent of the Statute of Frauds, is susceptible of a twofold meaning: (1) Whether, supposing a declaration of uses to be inserted in any such deed as above mentioned, the deed would require signing as well as sealing and delivery; and (2) whether, on the execution of any such deed as above mentioned (excluding a covenant to stand seised, upon which the question could not arise), a separate declaration of uses, capable of being executed by the statute out of the seisin transferred by the deed, is valid, though under the hand only of the declaring party. As to the first question, the reply seems to be that all transactions by deed are outside the mischief and scope of the statute, and therefore that such deeds do not require to be signed (*Cherry v. Heming*, 1849, 4 Ex. Rep. 631). As to the second question, there seems to be good ground to conclude that upon a feoffment, duly evidenced by

deed, a separate declaration of uses, under the hand only of the feoffor, would avail<sup>o</sup> to raise uses on the seisin of the feoffee, capable of being executed by the statute, because at the common law (Gillb. *Uses*, 270) a mere parol declaration of uses upon a feoffment would suffice; and there is nothing in the Statute of Frauds, s. 1, or 8 & 9 Vict. c. 106, s. 3, to make it necessary to insert any declaration of uses in the writing or deed therein respectively referred to; from which the conclusion seems to follow, that, at least if the requirements of the Statute of Frauds, s. 7, as to writing and signature, be complied with, such a separate declaration of uses would be valid. This conclusion seems not to follow in the case of the other assurances above referred to, because there seems to be no authority for holding that a parol declaration was at common law sufficient in the case of any assurance *in pais* except a feoffment.

**Declaration of War.**—A solemn declaration of war seems to have been considered by the peoples of antiquity, and especially by the Romans, as a measure of international propriety; and this extension to the conduct of States of what men in private life considered and still consider fair and honourable, was still the practice down to comparatively recent times. The last solemn declaration of war by heralds at the court of the State to whom the gauntlet was thrown down was made in 1657 in Copenhagen, on behalf of Sweden, who thus declared war against Denmark. Since then heralds have been dispensed with, and though there are instances of wars deliberately declared by direct notification, most of them have been commenced either before or without declaration.

The question whether a country living in peace with its neighbours has any reason to fear lest war should be *suddenly* burst upon it, was raised in connection with a Committee of the Board of Trade which sat in December 1881 and January 1882 on the subject of the Channel Tunnel, under the chairmanship of Sir T. (now Lord) Farrer. In the course of its proceedings, Sir T. Farrer had asked, "Looking at all that we remember ourselves, is it probable that war would be declared against us, as we might say, out of a clear sky, without any previous strain or notice that a quarrel was impending? Has that happened on any single occasion within the last fifty or hundred years?"

To ascertain the facts on this subject the Adjutant-General ordered that a paper be prepared, giving the historical cases in which hostilities had taken place between civilised Powers prior to a declaration of war. The preparation of the paper was intrusted to Lieutenant-Colonel Maurice, and it has since been published in an official volume, entitled *Hostilities without Declaration of War*, 1883. The result of the investigations was to show that there had not been, unless in mere theory, and in the tone adopted by historians as to what ought to have been, any established usage whatever on the subject. Circumstances have occurred in which "declarations of war" have been issued prior to hostilities; but during the hundred and seventy-one years given (from 1700 to 1870 inclusive) less than ten instances of the kind had occurred; while, on the other hand, a hundred and seven cases are recorded in which hostilities have been commenced by European Powers or the United States of America against other Powers without declaration of war.

In forty-one of the cases the manifest motive (in several instances the actually avowed motive) had been to secure advantages by the suddenness of the movement, and the consequent surprise of an unprepared

enemy; in twelve cases the action prior to declaration had apparently proceeded from mere indifference, or from a motive which has continually acted most powerfully, the desire to postpone as long as possible the formal declaration of war, or to throw upon an opponent the responsibility of being the first to declare it; in twelve cases the power to wage war at discretion, and according to circumstances, had been either assumed by or granted to local plenipotentiaries or other officers; in nine cases sudden action had been taken in order to anticipate the designs of an enemy or friend, either discovered by secret means, known, suspected, or in course of accomplishment; in sixteen cases the methods of hostility variously described as "the exaction of material guarantees," "federal execution," "reprisals," "unofficial war," "pressure," "irregular raids," are the chief features. The general characteristic of all these is a state intermediate between peace and war; and in four cases the mere progress of victory and the course of war has led to the violation of boundaries and the conquest of independent peaceful States. "In four or five cases Powers have slipped into war by giving friendly assistance as auxiliaries on opposite sides in a quarrel. Of these, perhaps, the most curious is that of the battle of Dettingen, where an English king commanding an English army fought against the French, though the two countries were not nominally at war, and ambassadors of each were at the time residing at the court of the other" (p. 5).

We may add to these instances given by Lieutenant-Colonel Maurice those of more recent wars: between France and Germany, preceded by a deliberate declaration; between Russia and Turkey, intimated by delivery to the Turkish representative in St. Petersburg of his passports, with an announcement that hostilities had been commenced; between Chile and Peru and Bolivia (1878-1883), begun without declaration by Chile; and between Servia and Bulgaria (1885), accompanied by a declaration on the part of Servia announcing hostilities *for the same day*. In the late war between Japan and China there was no declaration or intimation of any kind, and peace may be considered to have been broken when Japan notified to the Peking Government that she would act alone in Corea (see Ariga, *La Guerre Sino-Japonaise*, Paris, 1896, p. 17).

In short, a declaration is not considered in international practice as a necessary preliminary to a state of war. This difference between the rules of conduct prevailing as between persons and the practice of States is not, however, to be condemned without taking into consideration the publicity of all national acts in modern European States.

As to the seizure of droits of Admiralty on declaration of war, see  
• ENEMY'S GOODS.

[*Authorities*.—Rivier, *Droit des Gens*, Paris, 1896, vol. ii. p. 220; Hall, *Inter. Law*, 4th ed., 1896; Lieutenant-Colonel Maurice, *Hostilities without Declaration of War*; Feraud-Giraud, *Des Hostilités sans Declaration de Guerre*, Paris, 1885; Calvo, *Droit International*, vol. ii., Paris, 1888; Lawrence, *Principles of International Law*, London, 1895.]

**Declarations of Deceased Persons.**—To the general rule that evidence must be (a) direct or first hand, and (b) given on oath in Court, there are certain exceptions in favour of statements made by deceased persons. In the circumstances described below, hearsay evidence (on oath) may be given of statements made by deceased persons, though those statements were not made in Court or on oath (see the cases enumerated by Lord Blackburn in *Sturla v. Freccia*, 1880, 5 App. Cas. 623 at p. 641).

1. *Dying Declarations*.—In cases of homicide the declaration of the deceased, after the mortal blow, as to the fact itself and the party by whom it was committed, is admissible if at the time of making such declaration the declarant has an unqualified and hopeless belief in the nearness of death. The consciousness of impending death is considered as equivalent to the sanction of an oath (*per Byles, J., R. v. Jenkins*, 1869, L. R. 1 C. C. R. 187, 193). A declaration *in articulo mortis* by a child of such tender years that it could have no idea of a future state, is not admissible (*R. v. Pike*, 1829, 3 Car. & P. 598). Any hope of recovery, however slight, entertained *at the time* (subsequent hopes are immaterial, *R. v. Hubbard*, 1881, 14 Cox C. C. 565) of making the declaration renders the evidence of such declarations inadmissible (*R. v. Woodcock*, 1789, 1 Lea. C. C. 500; *R. v. Jenkins*, 1869, L. R. 1 C. C. R. 187). The length of time between the declaration and the death furnishes no rule for the admission or rejection of the declaration. In many cases dying declarations made several days before death have been admitted (*Margaret Tinckler's case*, 1781, 1 East, P. C. 354; *R. v. Moseley*, 1825, 1 Moo. C. C. 97; *R. v. Bonner*, 1834, 6 Car. & P. 386). The death of the deceased must be the subject of the charge, and the circumstances of the death the subject of the declaration (*R. v. Mead*, 1824, 2 Barn. & Cress. 605; *R. v. Hutchinson*, 1822, 2 Barn. & Cress. 608 (n.)).

The form of declaration is immaterial. It may be oral or in writing, and may be in answer to leading questions (*R. v. Smith*, 1865, L. & C. 607; *R. v. Fagent*, 1835, 7 Car. & P. 238). An examination taken before a magistrate, which is not admissible as such by reason of non-compliance with the statutory requirements, may be admitted as a dying declaration if the necessary conditions are fulfilled (*R. v. Woodcock*, 1789, 1 East, P. C. 356). The burden of proving the facts that render the declaration admissible is upon the prosecution (*R. v. Jenkins*, 1869, L. R. 1 C. C. R. 187), and it is for the judge at the trial, not the jury, to decide upon them (*R. v. Johns*, 1790, 1 East, P. C. 357; 1 Lea. C. C. 504 (n.)). The declarant need not have expressed his expectation of immediate death, if it can be inferred from other circumstances (*R. v. Johns, supra*; *R. v. Bonner*, 1834, 6 Car. & P. 386).

2. *Declarations in the Course of Duty*.—Where a person has made in the course of his duty and in the ordinary discharge of business a contemporaneous statement, whether oral or in writing, of a business transaction done by him or to him, such statement is admissible in evidence after his death (*Price v. Lord Torrington*, 1704, Salk. 285; 2 Raym. (Id.) 873; *Stapylton v. Clough*, 1853, 2 El. & Bl. 266; 23 L. J. Q. B. 5; *Doc v. Turford*, 1832, 3 Barn. & Adol. 898). It must be shown that it was the declarant's duty not only to perform the act, but to record it, and that the record was made at the time or immediately after the transaction (*Smith v. Blakey*, 1867, L. R. 2 Q. B. 326; *The Henry Coran*, 1878, 3 P. D. 156; *Massey v. Allen*, 1879, 13 Ch. D. 558). Such statements are only evidence of the particular acts necessary to the performance of the declarant's duty, and not of other circumstances, however naturally they may find a place therein, and however closely connected therewith (*Smith v. Blakey*, 1867, L. R. 2 Q. B. 326; *Chambers v. Bernasconi*, 1834, 1 C. M. & R. 347). The declaration is not admissible if it relates to facts ascertained, but not done, by the declarant, nor if he had any interest in misrepresenting the facts (*The Henry Coran*, 1878, 3 P. D. 156; *Polini v. Gray*, 1879, 12 Ch. D. 411, 426).

3. *Declarations against Interest*.—If a person has peculiar means of knowing a fact, and make a statement of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after

his death. The test of credibility is that the entry was made in prejudice of the party making it (*Higham v. Ridgway*, 1808, 10 East, 109; 2 Sm. L. C. 317; 10 R. R. 235).

The statement may be in writing, such as an entry charging the person making it with the receipt of money, or may be verbal (*Bewley v. Atkinson*, 1879, 13 Ch. D. 283).

The declaration must be against the proprietary or pecuniary interest of the person making it. Examples of entries against pecuniary interest are numerous, and consist mostly of entries admitting the receipt of money or acknowledgments of indebtedness (see *Middleton v. Mellon*, 1829, 10 Barn. & Cress. 317; *Spiers v. Morris*, 1833, 9 Bing. 687; and *Higham v. Ridgway*, 2 Sm. L. C. 317, where an entry by a man midwife in his ledger, showing that he had been paid for attendance on a woman at the birth of a child on a certain date, was held to be evidence on an issue as to the age of the child). Declarations against proprietary interest may consist of acknowledgments by persons in possession of land that they pay rent for it, or other admissions tending to rebut the presumption of ownership in fee which arises from occupation (*Gery v. Redman*, 1875, 1 Q. B. D. 161; *R. v. Overseers of Birmingham*, 1861, 1 B. & S. 763; *Peaceable v. Watson*, 1811, 4 Taun. 16; 13 R. R. 552).

It is not enough that the person making the declaration thereby subjects himself to liability to a criminal prosecution (*Sussex Peerage case*, 1844, 11 Cl. & Fin. 85, 111).

The declaration must be such that, *prima facie*, standing alone its natural meaning must be against the interest of the person making it at the time it is made, and must not be such that it might be either favourable to or against his interest (*Massey v. Allen*, 1879, 13 Ch. D. 558), or may be against his interest in certain events (*In re Tollemache*, 1884, 14 Q. B. D. 415); on the other hand, if it was against his interest at the time it was made, it is none the less admissible because it may be available subsequently to prove a collateral matter in his favour (*Taylor v. Witham*, 1876, 3 Ch. D. 605).

The statement is evidence as well of the truth of the particular part thereof which is against interest as of other facts stated in it, but the facts thus stated must be part of the same statement, or connected with it, or referred to by it (*R. v. Overseers of Birmingham*, *supra*; *Higham v. Ridgway*, *supra*).

4. *Declarations as to Pedigree*.—In questions of pedigree the statements of deceased members of the family made *ante litem motam*, before there was anything to throw doubt upon them, are evidence to prove pedigree (*Berkeley Peerage case*, 1811, 4 Camp. 401; 14 R. R. 782; *Monckton v. A.-G.*, 1831, 2 Russ. & M. 147). And such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognised them (per Lord Blackburn in *Sturla v. Freccia*, 1880, 5 App. Cas. 623, 641; 29 W. R. 217).

It must be proved, to the satisfaction of the judge, by evidence outside the declaration itself, that the person making, or adopting or assenting to, the declaration is related to the family (*Whitelock v. Baker*, 1807, 3 Ves. 571; 9 R. R. 216; *Monckton v. A.-G.*, 1831, 2 Russ. & M. 147; *Dpe d. Jenkins v. Davies*, 1847, 10 Q. B. 314; 16 L. J. Q. B. 218). A relationship by marriage is enough. So a wife's statement as to her husband's family, or a husband's declaration as to his wife's legitimacy, is admissible (*The*

*Shrewsbury Peerage*, 1857, 7 H. L. 1; *Vowles v. Young*, 1806, 3 Ves. 140; 9 R. R. 154). But the declaration of an illegitimate member of a family respecting his illegitimate brothers is not admissible, nor are the statements of other persons who are merely living in habits of intimacy among those who are members of the family (*Doe d. Bamford v. Barton*, 1837, 2 Moo. & R. 28; *Johnson v. Lawson*, 1824, 2 Bing. 86; 27 R. R. 558).

It is not necessary that they should have been made contemporaneously with the events to which they refer, or even that they should be founded on the direct knowledge of the declarant; they may be based on mere family tradition (*Doe d. Jenkins v. Davies*, 1847, 10 Q. B. 314; *Goodright v. Moss*, 1777, 2 Cowp. 591).

The declaration may be in any form—an oral statement, a family tree, a statement in writing in a family Bible, a will or any other paper, or a mural or monumental inscription—and is admissible although made for the express purpose of establishing the pedigree, provided no controversy had arisen at the time it was made (*Whitlock v. Baker*, 1807, 3 Ves. 511; 9 R. R. 216; *Kidney v. Cockburn*, 1831, 2 Russ. & M. 167; *Berkeley Peerage case*, 1811, 4 Camp. 401; 14 R. R. 782; *Davies v. Lowndes*, 1843, 7 Sco. N. R. 141; 6 Man. & G. 471; *Murray v. Milner*, 1879, 12 Ch. D. 845).

Such declarations are only admissible in questions of pedigree to prove pedigree, and are not admissible to prove the facts which constitute a pedigree, such as the date of a birth or marriage, where they have to be proved for other purposes. So they are not admissible to prove infancy as a defence to an action of contract (*Haines v. Guthrie*, 1884, 13 Q. B. D. 818). But in a question of pedigree the declarations of a deceased father are evidence to prove even the illegitimacy of his children by showing that they were born before marriage, or that there never was a marriage (*Murray v. Milner*, 1879, 12 Ch. D. 845; *Goodright v. Moss*, 1777, 2 Cowp. 591; *In re Turner*, 1885, 29 Ch. D. 985).

*Declarations and res gestæ.*—The declarations of deceased persons above treated of are to be distinguished from declarations in case of violence (see COMPLAINT, vol. iii. pp. 237, 238), declarations accompanying acts, declarations as to health, and declarations as to marriage and legitimacy, which are *admissible although the declarants are not dead*, and may be considered rather as evidence of conduct, part of the *res gestæ*, than as hearsay evidence (see Wills on *Evidence*, pp. 142, 155).

*A declaration accompanying an act*, the proof of which is relevant, may be given in evidence to prove the quality and intention of the act (per Parke, B., *Wright v. Tatham*, 1837, 7 Ad. & E. 384). The declaration must have been made at the time of, or immediately after, the act\* (*Lars v. Marton*, 1832, 1 Moo. & R. 210; and see *Bennison v. Cartwright*, 1866, 5 B. & S. 1). So where the issue was whether the plaintiff parted with goods in consequence of a false representation, his declaration at the time of parting with them is evidence (*Fellowes v. Williamson*, 1829, Moo. & M. 306). This form of evidence is often available to prove intention with regard to domicile (*Doucet v. Geoghegan*, 1878, 9 Ch. D. 441; *Hodges v. Beauchesne*, 1858, 12 Moo. P. C. 285).

Where the *state of a person's health* is in issue, his statements with regard to his health and symptoms, made contemporaneously, whether to his medical attendant or to any other person, may be given in evidence (*Ateson v. Lord Kinnaird*, 1805, 6 East, 188; *R. v. Johnson*, 1847, 2 Car. & Kir. 354; *R. v. Blandy*, 1752, 18 St. Tri. 1135-38).

*Declarations as to Legitimacy and Marriage* are akin to these.—See BASTARD, vol. ii. p. 30. In addition to authorities noted there, see *Burnaby*

*v. Baillie*, 1889, 42 Ch. D. 282; and as to the admission of statements made by a man and woman tending to show that they are or are not husband and wife when the issue is whether they are married, see *R. v. Wilson*, 1862, 3 F. & F. 119; *Woodgate v. Potts*, 1847, 2 Car. & Kir. 457.

[*Authorities*.—Taylor on *Evidence*, 9th ed.; Wills on *Evidence*, 1894.]

**Declaratory Part of a Decree.**—That part of a decree which declares the rights of the party, as distinct from recitals, etc.

**Declaratory Statute.**—A declaratory statute or Act may be defined as an Act passed to remove doubts existing as to the common law, or the meaning or effect of any statute, or to codify the rules of equity and the common law as established by judicial decision. Prominent instances of a declaratory statute are the Partnership Act, 1890, and the Territorial Waters Jurisdiction Act, 1878, which declares the extent of Her Majesty's jurisdiction over the open seas adjacent to the coast. Blackstone says statutes are declaratory of the common law "where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the Parliament has thought proper, *in perpetuum testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been." He gives as an instance the Statute of Treasons, 25 Edw. III. c. 2, which enumerates several kinds of offence which before were treason at common law.

[*Authorities*.—See Hardcastle, *Statutes*, 2nd ed., 1892; Maxwell, *Interpretation of Statutes*, 3rd ed., 1896.]

**Declare.**—In *Richardson v. Jenkins*, 1853, 1 Drew. 477, one of the questions for decision was whether a deed by which "it was declared" that the person executing it should stand possessed of certain trust funds, amounted to a contract by him, or whether, in order to constitute a contract, he should have "covenanted" or "agreed" to execute the trusts. Kindersley, V.C., said that when the parties to a deed frame it in the terms of *declaring* that such and such things shall be done, the term "declare" is sufficient to constitute a contract. See further Stroud, *Jud. Dict.*

**De contumace capiendo.**—This is a writ substituted by Statute 53 Geo. III. c. 127 (1813) for the old writ *de excommunicato capiendo*, in the case of disobedience to or contempt of an Ecclesiastical Court. The contumacy is within ten days signified to the king in Chancery in the form annexed to the Act; a writ *de contumace capiendo* thereupon issues in the statutory form. The person complained of is then to be arrested and detained, but declared absolved and discharged upon his duly appearing, obeying, or submitting. As to what amounts to satisfaction of a contempt, see *Dean v. Green*, 1882, 8 P. D. 89. The statute 3 & 4 Vict. c. 93, 1840, empowers the Ecclesiastical Courts to order the release of a person in custody under the writ, but only (except in the case of a person already imprisoned for six months or more for non-payment of church rates not exceeding £5) with the consent of the other party or parties to the suit (see *Hudson v. Forth*, 1877, 2 P. D. 125).

[*Authorities*.—See Phillimore's *Ecc. Law*, 2nd ed., pp. 1099-1107.]

**Decoy.**—A contrivance for the capture of aquatic wild fowl. For its structure, see *Encyclopædia of British Sport, s.v.* The erection of such a contrivance does not give the owner of the land on which it is placed any property in the wild fowl till actually captured; but its construction and management are so far regarded as a trade or business that the owner can sue persons who on their own lands or even on a navigable river fire off guns with the object or result of driving the wild fowl from the decoy, and can recover damages for the consequent disturbance of his business (*Keeble v. Hickeringill*, 1708, 11 East, 574; *Carrington v. Taylor*, 1809, 11 East, 571).

The *ratio decidendi* and the correctness of these decisions have been and still are the subject of much controversy (see the *Mogul* case, [1891] App. Cas. 25; *Flood v. Jackson*, [1895] 2 Q. B. 21, now under consideration in the House of Lords).

**Decrees.**—The distinction between decrees in Chancery and judgments at the common law was formerly much more marked than it is at the present day. The distinction was twofold—first as regards legal effect, and secondly as regards subject-matter. Previously to the fusion of the equitable and common law jurisdictions effected by the Judicature Acts, it might happen that a plaintiff who erroneously conceived himself to be entitled to a decree in Chancery when he was in fact entitled to a judgment at common law, or *vice versa*, lost his remedy altogether. This ground of distinction has now been removed, but the distinction as regards subject-matter still remains, and although by sec. 100 of the Judicature Act, 1873, the term “judgment” now includes “decree,” yet in view of the more comprehensive nature of the relief given in the Chancery Division, and the necessarily complicated character of the judgments pronounced there, the expression “decree” is still usefully retained, the more so as “notwithstanding the greater pliability of equitable jurisdiction and procedure, the forms of the decrees and orders by which the Court of Chancery gave effect to its determinations were generally well established and for the most part uniform” (Seton on *Judgments and Orders*, 5th ed., p. 1).

Decrees in general consist of four parts:—(1) the date and title; (2) the recitals; (3) the declaratory part, and (4) the ordering or mandatory part. Every decree must also be marked with the reference to the record (see Order 61, r. 19) showing the year of the issue of the writ or originating summons, the initial letter of the plaintiff's name, and the consecutive number in the central office books for the year. The two first parts of a decree are of a preliminary character, being designed to show the circumstances attending the making of it, and, speaking generally, are the concern of the registrar rather than of counsel. No recitals of facts proved in evidence are introduced, unless the Court otherwise specifically directs, but the pleadings, evidence, affidavits, exhibits, or other matters or documents on which the decree is founded, should be merely referred to. In matters of contempt, however (see, for example, Seton, pp. 411, 631), and in a limited class of cases in which it is found expedient so to do, recitals of facts are inserted. A reference to the affidavits, and other evidence read or adduced is entered in such a way as to show upon an appeal or any subsequent application precisely what has been received (*Dan. Ch. Pr.* p. 793), and when the Court proceeds upon admissions of fact by the parties, or their counsel, consents, submissions, undertakings, or waivers of claim, such admissions, etc., should be inserted in the decree or order immediately before the ordering part, if they relate to the whole,



or immediately before the part to which they relate, if they do not relate to the whole (Seton, 133), and this is a matter which sometimes demands the attention of counsel. For forms of stating undertakings and "entering" evidence, see Seton, 124 *et seq.*

The declaratory part of the decree contains such declarations of matters of fact, or of the rights of the parties as are necessary either by way of substantive relief or as groundwork for consequential relief. Thus in decrees to execute the trusts of wills relating to real estate the Court often declares the will to be well proved, and that the same ought to be established and the trusts thereof performed, and where the Court gives effect to an agreement, or an equitable mortgage, or construes a will or other instrument, or sets an instrument aside, and in many other cases declarations are convenient and usual (Seton, 144). Some declarations are of a more or less stereotyped character, and may be used as precedents; and forms of these will be found in Seton, but others are of a special character, and the practitioner should carefully formulate in his own mind the nature of the declaratory relief which fits the facts of his case before having recourse to the forms. A declaration of the Court is a judicial act, which will not in general be made on admissions or by consent, but only when the Court is satisfied by evidence (*Williams v. Powell*, 1894, W. N. p. 141).

Next in order, after the declarations of right, come the ACCOUNTS AND INQUIRIES which are directed in order to ascertain the nature or extent of the rights of the parties or to give effect to them. Many of these are of a stereotyped character, and as the working out of them is thoroughly understood by the masters and clerks in chambers, the received forms are of the greatest value in the preparation of this part of the decree, and are closely adhered to. Where, by any judgment or order, any accounts are directed to be taken or inquiries made, each such direction is to be numbered, so that, as far as may be, each distinct account and inquiry may be designated by a number (Order 33, r. 7). Where accounts or inquiries are directed, the decree, except in simple cases, concludes by making provision for the further consideration by the Court of any part of the subject-matter which may, on the result of such accounts and inquiries, require such consideration. Thus the decree in an ordinary administration action consists of accounts and inquiries, followed by a mere general direction that the estate be applied in a due course of administration, and the actual distribution of the estate among the persons entitled is worked out by the order made on further consideration. So in actions for foreclosure of mortgages the decree in the first instance is made "nisi," *i.e.* for foreclosure, if default is made in payment within six months after the certificate of the master, and on proof of such default a subsequent order for foreclosure absolute is made. On the other hand, in simple cases, as, for example, where a single common account is directed (see Seton, vol. ii. p. 1149), the decree itself directs payment of the amount which shall be found due, liberty to apply to the Court if necessary being given.

Decrees are drawn up without regard to punctuation, and the separate clauses are indicated by the use of capital letters, the advantage of this practice being stated to be that "it necessitates careful wording of the clauses, and tends to prevent ambiguity and mistake, or the possibility of the order being tampered with" (Seton, p. 51). As the names of the parties appear in the title to the decree, it is usual in the body of it to refer to them simply as plaintiff or defendant, or otherwise as the case may be, without naming them; but where the Court directs payment of money by

one party to another, or the performance of any act which may be enforced by attachment, it is essential to insert the names both of the party to perform the act, and, in cases of payment of money, of the party to receive payment. The phraseology of decrees should be succinct and precise, and the use of familiar and inaccurate expressions such as "pure personalty" or "floating security" should be avoided.

The declaratory and mandatory parts of decrees are, in their preliminary stage, often drawn up in "minutes," *i.e.* in a compendious form, eschewing details, and indicating the nature of the directions which the Court is to be invited to give. These minutes are usually prepared by counsel, and are subsequently expanded under the supervision of the registrar into the complete decree. The difference between the minute form and the completer form will readily be understood by reference to Seton, pp. 6, 124, and *passim*. Where an action is brought on as a short cause it is required that minutes of the proposed decree or order should be left with the judge one clear day before the cause is put into the paper, and such minutes ought always to state whether the action is brought on in default of appearance or of defence, or by consent or otherwise. For forms, see Seton, vol. i. pp. 145-155.

When a decree is pronounced by the Court, a note of it is taken down by the registrar in attendance, and from this note and the minutes, if any, or the indorsements made on their briefs by counsel of the short effect of the decree, the draft of the formal decree is prepared (see Seton, 163; *Dan. Ch. Pr.* pp. 800, 801). Immediately after the decree is pronounced, the party having the carriage of it, who is in general the plaintiff, should leave his papers with the registrar's clerk; otherwise the registrar may draw up the decree at the instance of any other party. As to bespeaking the decree or order, see Order 62, rr. 4, 5, 6, and for an enumeration of the papers to be left with the registrar on bespeaking, see *Dan. Ch. Pr.* pp. 801 *et seq.* A separate copy of the draft or minutes is prepared and delivered out to each party represented by a separate solicitor (Seton, 163). Unnecessary expense may be caused by delay in proceeding to draw up a decree.

In drawing up any decree or order the registrar may introduce such alterations as from his experience he believes the Court would sanction, and these alterations are binding on the parties (Seton, 164); but if upon perusing the minutes or draft it appears that anything is doubtfully expressed, or contrary to the plain sense and meaning of the Court, or that anything has been omitted which ought to have been inserted, and the registrar refuses to make an alteration, an application or motion with notice may be made to the Court to vary the minutes. As to the procedure on such an application see Seton, 164, 165; *Dan. Ch. Pr.* 805, 806. These applications are not encouraged by the Court, and questions of importance ought not to be discussed upon them.

In order to preclude questions as to the decree actually made the Court sometimes requires that the minutes shall be signed by the counsel for the plaintiff, or by counsel on both sides; and where orders are taken by arrangement between parties, the minutes should always be signed by the respective counsel.

When the decree or order has been settled by the registrar, the next step is for him to name or appoint in writing a time for the passing of it. The manner of effecting this is prescribed by Order 62, rr. 11-13, but is subject to a special power given by r. 14 to the registrar, in any case in which he may think it expedient, to settle or pass the decree or order without making any appointment for either purpose and without notice

to any party. When the decree has been drawn up by the registrar, the engrossment, together with the pleadings to be filed, must be taken to the Writ Appearance and Judgment Department of the Central Office, and the officer receiving the same makes a note in the margin of the engrossment that the pleadings have been filed, authenticates such note with the small seal of the office, and returns the engrossment to the solicitor (Seton, 165), so that the registrar before passing the decree may be satisfied that the pleadings have been filed. A decree or order is said to be passed when the registrar has inserted his initials in the margin at the foot of the last page of the engrossment or print, as an authority to the clerk of entries to enter it in the registrar's book (Seton, 165). Every order which is to be acted on by the paymaster is to be drawn up and entered by the registrar unless the judge otherwise directs, and is either to be wholly printed, or, in cases in which printed forms can be used, may be partly in print and partly in writing (Supreme Court Fund Rules, 1894, r. 23). Where an order has to be printed, the registrar, in lieu of causing it to be engrossed, sends it to the Queen's printers for proof. When any order to be acted upon by the paymaster is left for entry, a further copy of the schedules thereto, initialled by the registrar and stamped with his official seal on every leaf, is to be left therewith. Such further copy of the schedules is examined and sealed and marked with a reference to the order as entered, and sent to the paymaster (S. C. F. R., 1894, r. 24).

The entry of the decree is made by the registrar, as the proper officer, in the book to be kept for the purpose, pursuant to Order 41, r. 1. As to the registrar's books (known as "Reg. Lib.") and the mode of referring to them, see Seton, pp. 3, 4. The entry of the decree is to be dated as of the day on which it is pronounced, unless the Court otherwise orders, and the decree takes effect from that date. By special leave of the Court, however, a decree may be ante-dated or post-dated. Proceedings under a decree or order before it has been entered are irregular and voidable, and an attachment for contempt will not be granted for disobedience to an order which has not been entered; but in the case of injunctions and restraining orders, parties are bound by the notice of the order, however received, from the time when it is pronounced (Seton, 166).

Under Order 28, r. 11, clerical mistakes in judgments or arising therein from any accidental slip or omission may at any time be corrected by the Court or a judge on motion or summons without an appeal; but except in cases covered by this rule, after a decree has been "perfected" by entry, even where it has been taken by consent and under a mistake, the Court cannot set it aside otherwise than in a fresh action brought for the purpose, unless the decree as drawn up does not correctly state what the Court actually decided and intended to decide, in which case application may be made by motion in the action (*Ainsworth v. Wilding*, [1896] 1 Ch. 673. Even when the decree has not been drawn up the Court would probably in some cases decline to entertain a motion, as, for example, where from the nature of the grounds on which the application was based, conflicting evidence would have to be gone into or *viva voce* evidence considered, or if the decree had been acted upon and the rights of third parties had intervened. In general, upon proper application, an order which has been taken by consent can be set aside upon any ground which would invalidate the agreement upon which it is based, as, for instance, on the ground of common mistake of material facts, see *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273, and *Hickman v. Berens*, [1895] 2 Ch. 638, explained by Romer, J., in *Ainsworth v. Wilding* (*ubi supra*). And although the Court has no juris-

diction to alter, or vary an order after it has been passed and entered, yet it may make a supplemental order, *e.g.* an order directing that the party benefited by the previous order shall not be entitled to receive any benefit under it except on certain conditions (*In re Scowby*; *Scowby v. Scowby*, [1897] 1 Ch. 741). As to enrolment of decrees and their execution by process, see ENROLMENT; EXECUTION.

[*Authorities.*—See Seton on *Judgments and Orders*, 1891–93; Pemberton, *Judgments and Orders*, 1889.]

**Dedication.**—See HIGHWAYS.

**Dedimus Potestatem.**—A writ, in the nature of a commission, formerly issued by the Court of Chancery, empowering the persons named therein to do a particular thing, *e.g.* to administer an oath or take an acknowledgment in the matter specified.

**Deed.**—A deed is a writing sealed and delivered; or, to speak more particularly, it is a writing done on paper or parchment, testifying to the performance, by some person named therein, of some act in the law (such as the conveyance of property or the making of a contract), authenticated by the seal of the person to be bound thereby, and delivered to the person intended to benefit thereunder (see *Co. Lit.* 35 *b*, 171 *b*). Such a writing, says Blackstone (2 *Com.* 295), “is called a deed, in Latin *factum*, *xar' iξozn*, because it is the most solemn and authentic act that a man can possibly perform with relation to the disposal of his property; and therefore a man shall always be *estopped* (see ESTOPPEL) by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed.” The peculiar effect so attributed to a deed in English law appears to have its origin in the importance attached in the early law to writing as a mode of proof. Writing being a rare accomplishment in the Middle Ages, it was a particular solemnity to make a written record of a man's act or intention. And it was accordingly considered that a charter or writing, whereby one formally expressed an intention of gift, or bound himself over to perform any act, afforded conclusive proof of the matter expressed therein, unless it were shown to have been forged, or extorted by fraud or force, or like objections to its validity were established. In very early times, after the Norman Conquest, it appears that even an unsealed charter might have this effect. But afterwards it came to be settled that a charter must have affixed to it the seal of the person whose act or promise it recorded, in order to be admitted as conclusive evidence against him. Thenceforward the conclusive effect which the early law gave to writings was confined to sealed writings. To the end of the mediæval period, therefore, all writings intended to have legal effect were sealed; and nothing was styled a writing but a document under seal. Hence it is that in every transaction in which writing is required by the *common law* a deed is necessary (see *Glanv.* x. 12; *Bract.*, fo. 100, 396; *Britt.*, liv. 1, ch. 29, ss. 5, 14–22; *Fleta*, lib. ii. c. 60, s. 25; *Y. B.* 30 *Edw.* i. p. 158; *Litt.* ss. 183, 217, 250, 252, 365–367; *Pollock and Maitland, Hist. Eng. Law*, ii. 218, 220–222).

What is requisite to a deed appears from the definition given above. First, there must be a writing done on paper or parchment, no other

substance being admissible; the writing, however, need not be done with pen and ink, as the modern common law recognises other means of marking letters, such as printing, lithography, or drawing with a pencil (2 Black. Com. 297; *Schneider v. Morris*, 2 M. & S. 286; 15 R. R. 250; *Geary v. Physic*, 1826, 5 Barn. & Cress. 234; *Bennett v. Brumfit*, 1868, L. R. 3 C. P. 28; *Dench v. Dench*, 1877, 2 P. D. 60; *Tourret v. Cripps*, 1879, 48 L. J. Ch. 567). Secondly, the writing must testify to the performance of some act in the law, to something which is intended to affect the party's legal position. We apprehend that the acceptance by sealed writing of an invitation to dinner will no more give a ground of action, if the engagement be broken, than an oral promise; although in either case the element of consideration does not appear to be wanting (see *Co. Lit.* 35 *b*; Pollock on *Contract*, 2, and Note (a), 4th ed.). The legal act, conveyance, contract, or what not, to which the deed is to testify, must of course be set forth with certainty, the parties to be bound and to benefit thereby being sufficiently designated. This, however, is no particular requisite of a deed, though treated so by both Coke and Blackstone (*Co. Lit.* 35 *b*; 2 Black. Com. 296); certainty must be established whenever any alleged act in the law is put to the proof, whether the evidence consist of a deed, an unsealed writing, or oral testimony. Thirdly, the writing must be sealed. In modern practice the kind of seal made use of is not regarded, and the mere placing of the finger on a seal already made is held to be equivalent to sealing (Shep. Touch. 57; *National Provincial Bank of England v. Jackson*, 1886, 33 Ch. D. 1). Fourthly, the sealed writing must be delivered. The delivery of a deed is properly the handing over of the sealed writing by the party to be bound to the person intended to benefit thereunder (*Co. Lit.* 36 *a*, 49 *b*); but in modern practice, uttering the words "I deliver this as my act and deed" at or after the time of sealing, is held to be equivalent to delivery, even though the party to be bound keep the deed himself (*Doc. d. Garnous v. Knight*, 1826, 5 Barn. & Cress. 671; *Grugcon v. Grugcon*, 1840, 4 Y. & C. 119, 130; *Exton v. Scott*, 1833, 6 Sim. 31; *Fletcher v. Fletcher*, 1844, 4 Hare, 67; *Hall v. Bainbridge*, 1849, 12 Q. B. 699).

The sealing and delivery of a deed are termed the execution of it. Sometimes a sealed writing is delivered as an *escrow* or mere writing (*scriptum*), to become the deed of the party to be bound on the performance of some condition, as the payment of money or the like. To have this effect, the deed must not be immediately delivered to the person intended to benefit, as in such case any expression of an intention to deliver as an escrow merely would be repugnant to the act of delivering the deed, and therefore void (*Co. Lit.* 36 *a*). But the writing should be delivered to some third person, not a party to the deed, to be delivered over on the performance of the condition to the person intended to benefit. Until the writing be delivered over, it will not be the deed of the party to be bound; but when it is so handed over, it becomes his deed, and takes effect from the time of its first delivery as an escrow (Shep. Touch. 58, 59; *Graham v. Graham*, 1 Ves. Jun. 272, 274, 275; *Bowker v. Burdckin*, 1843, 11 Mee. & W. 128; *Nash v. Flynn*, 1 Jo. & Lat. 162; *Millership v. Brookes*, 1860, 5 H. & N. 797; *Watkins v. Nash*, 1875, L. R. 20 Eq. 262).

Deeds are either deeds poll or indentures. The former are those made by one person only; to the latter, two or more persons are parties. These terms, however, are merely derived from the manner in which the parchment is cut. For indentures, the skin is cut with an indented or waving line at the top—a custom which originated in the practice of making two or more copies of a deed to which several persons were parties, when the

necessary pieces of parchment were cut off one skin and divided by a jagged or indented line, so that each part of the deed might tally with the other. For deeds to be made by one person only, the parchment is polled or shaven even (*Co. Lit.* 229 a; 2 *Black. Com.* 295, 296). Lord Coke lays down that a deed cannot be an indenture unless actually indented, not even though it describe itself as "This indenture" (*Co. Lit.* 229 a). But by the Real Property Act, 1845 (s. 5), a deed executed after the 1st of October 1845, and purporting to be an indenture, shall have the effect of an indenture, though not actually indented. At common law, a person could not take any immediate benefit under an indenture, or sue on any covenant contained therein, unless he were named as a party thereto (*Co. Lit.* 231 a; 2 *Inst.* 673; *Berkeley v. Hardy*, 1826, 5 Barn. & Cress. 355; *Southampton v. Brown*, 1827, 6 Barn. & Cress. 718). But now, by the same statute, under an indenture executed after the 1st of October 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture. Under a deed poll, any person may accept a grant or other benefit (2 *Inst.* 673).

The principal matter in which the common law required the evidence of a deed was the conveyance of incorporeal hereditaments, whether made by way of the transfer of an existing or the creation of a new right (*Hevelins v. Shippam*, 1826, 5 Barn. & Cress. 251; *Wood v. Leadbitter*, 1845, 13 Mee. & W. 838). These, as is well known, were said to lie in *grant*, a word which is in our law especially appropriated to describe the conveyance of things which pass by deed and not by delivery of possession (*Co. Lit.* 9 a, 172 a). A condition defeating an estate of freehold was likewise required to be made by deed (*Litt. ss.* 365-369). And an express release, which is the relinquishment in writing either of right in lands or tenements, or of any action or actions or other things, is another matter in which the common law requires a deed (*Litt. s.* 444; *Co. Lit.* 264 b; *Shep. Touch.* 320, 323, *Preston's ed.*). It appears, however, that a parol agreement may be discharged by a parol release given before any cause of action has accrued thereon (*Langden v. Stokes*, *Cro.* (3) 383; *King v. Gillett*, 1840, 7 Mee. & W. 55). And, according to modern decisions, a gift may well be made by words only of corporeal chattels, which are already in the possession of the donee (*Winter v. Winter*, 9 W. R. 747; *Kilpin v. Ratley*, [1892] 1 Q. B. 582), although such a gift seems to be no more than a release of the donor's right in the chattels, and it has been said that a release of right in chattels personal must be by deed (per Anderson, C. J., *Leon*. 283). But the release of a debt, without consideration, is ineffectual unless made by deed (*Edwards v. Weekes*, *Freem. K. B.* 230, pl. 239; *Corporation of Scarborough v. Butler*, 3 Lev. 237; *May v. King*, 12 Mod. Ca. 537; *Heathcote v. Crookshanks*, 1787, 2 T. R. 24; *Reeves v. Brymer*, 6 Ves. 516; *Cross v. Sprigg*, 6 Hare, 552; *Strong v. Bird*, 1874, L. R. 18 Eq. 315, 317). An exception occurs in the case of a bill of exchange or promissory note, on which the liability may be discharged according to the law merchant by the express renunciation on the part of the holder of his claim (*Foster v. Darber*, 1853, 8 Ex. Rep. 839, 851). By the Bills of Exchange Act, 1882, s. 62 (1), such renunciation must be in writing, unless the bill or note be delivered up to the acceptor or maker (*Edwards v. Walters*, [1896] 2 Ch. 157).

A further consequence of the binding force given to writing in the early law, and of the accidental requirement of authentication of a writing by the party's seal, was that a promise made by deed to perform any act was con-

clusively binding on the maker; and so an agreement made by deed (called a covenant) became the formal contract of English law (Pollock and Maitland, *Hist. Eng. Law*, ii. 217-222). After the later law of simple contracts had been evolved, with its requirement of consideration to be given to make a promise enforceable, the apparent anomaly, that a promise made by deed was enforceable at law, although there were no considerations for making the promise, was explained by saying that in law every deed imports a consideration (Plowd. 308, 309; Bacon on *Uses*, 310; see Holmes, *Common Law*, 271-273). This explanation was adopted as a rule of law (2 Black. Com. 446). The true explanation, however, appears to be that the legal effect of a deed was not impaired by the development of the doctrine of consideration. And to the present day the law remains that a promise made by deed is irrevocable, even before its acceptance (*Xenos v. Wickham*, 1867, L. R. 2 H. L. 296), and is enforceable without any consideration (*Ex parte Pottinger*, 1878, 8 Ch. D. 621).

In order to prevent the conclusive effect of a deed from being used as an instrument of fraud, it was held that any alteration, rasure, or addition made in a material part of a deed after its execution, even by a stranger, would render the deed void, and that any alteration of the deed by a party thereto, though in words not material, would render it void (*Pigot's case*, 11 Co. Rep. 27, a). It is now held, however, that additions consistent with the purposes of a deed will not avoid it, though made by a party to the deed after its execution (*Adsetts v. Hives*, 1863, 33 Beav. 52; *Aldous v. Cornwall*, 1868, L. R. 3 Q. B. 573). But a material alteration inconsistent with the original purpose of a deed, still makes it void (*Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75). See ATTESTATION, vol. i. p. 406; INTERPRETATION.

*Deeds, Offences as to.*—A deed relating to land, whether regarded as an evidence of title or as a chose in action, is not the subject of larceny at common law (*R. v. Watts*, 1854, D. & P. 326; Steph. *Dig. Crim. Law*, 5th ed., at p. 314). But by the effect of the definitions in sec. 1 of the Larceny Act, 1861, it is brought as a "valuable security" and "document of title to lands," within the scope of that Act.

(a) The theft, or the destruction, cancellation, obliteration, or concealment, for any fraudulent purpose, of deeds which form the whole or part of the documents of title to land, is felony, punishable by penal servitude from three to five years, or imprisonment, with or without hard labour, for not over two years (24 & 25 Vict. c. 96, ss. 1, 28; 54 & 55 Vict. c. 69, s. 1). It is not quite clear whether mortgage deeds fall within this provision as documents of title to lands, or within the provisions of sec. 27 of the Larceny Act, 1861. As to theft of valuable securities, see *R. v. Powell*, 1851, 21 L. J. M. C. 78. The Malicious Damage Act, 1861, 24 & 25 Vict. c. 97, contains no specific provisions as to damaging deeds. (b) Where on a conveyance or assignment by way of sale or mortgage of land, or chattels, real or personal, or a chose in action, the seller or mortgagor, or his solicitor or agent, conceals (*inter alia*) from the purchaser or mortgagee (*inter alia*) any deed material to the title, with intent to defraud, he is guilty of a misdemeanour punishable by imprisonment, with or without hard labour, for not over two years, without prejudice to his civil liability for the damages caused by the concealment. Prosecution is allowed only by sanction of the Attorney-General (22 & 23 Vict. c. 35, ss. 24, 25; 23 & 24 Vict. c. 38, s. 8). (c) The theft, or destructive cancellation or obliteration, total or partial, for a fraudulent purpose, of a deed which is a valuable security for money,

but is not a document of title to lands, is a felony punishable as (a) (24 & 25 Vict. c. 96, ss. 1, 27). (d) To induce a person by violence or threats to execute a deed is felony (24 & 25 Vict. c. 96, s. 48; see *R. v. John*, 1875, 13 Cox C. C. 100; and see MENACES). (e) To obtain the execution of a deed by false pretences is a misdemeanour (24 & 25 Vict. c. 96, s. 90). See FALSE PRETENCES. (f) To forge or alter a deed, or utter, dispose of, or put it off knowing it to be forged, with intent to defraud, is felony (24 & 25 Vict. c. 98, s. 20). See FORGERY. (g) To acknowledge a deed, before any Court, judge, or other person lawfully authorised, in the name of another, if done without lawful authority or excuse, is felony (24 & 25 Vict. c. 98, s. 34). See PERSONATION.

[*Authorities*.—All the leading authorities are cited in the text.]

**Deed of Covenant.**—A deed whereby one party covenants with another to do certain things. As a general rule, covenants appear in a deed as incidental to other matters, but sometimes they are embodied in a separate deed of covenant. At one time it was not uncommon for a vendor of land to covenant by separate deed of covenant to produce the title-deeds relating to the property conveyed when called upon. An example of a deed of covenant between vendors and purchasers of land laid out for building purposes will be found in *Key and Elphinstone's Precedents*, 4th ed., vol. i. p. 599.

**Deed of Grant.**—Remainders, reversions, and incorporeal hereditaments have always lain in grant, that is, have been transferable by a simple deed of grant from the vendor to the purchaser; but it is only since the Real Property Act, 1845, that corporeal hereditaments have been alienable in the same manner. Prior to that statute corporeal hereditaments were said to lie in livery and not in grant, and the usual method of conveying property of this nature was by the cumbrous lease and release. (See LEASE AND RELEASE.)

The word "grant" was the proper word to be used in a deed of grant, but its use was not imperative, other words, indicating the intention to grant the property, answering the like purpose (*Shore v Pincke*, 1793, 5 T. R. 124), and now by the Conveyancing Act, 1881, it is expressly enacted that "the use of the word 'grant' is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal" (s. 49).

**Deemed.**—The word "deemed" is used in various senses. Sometimes it means "generally regarded"; cp. Lunacy Act, 1890, s. 13, subss. (1). At other times it signifies taken *prima facie* to be, while in other cases it means "taken conclusively to be." Examples of these two last meanings will be found in sec. 18 of the Lunacy Act, 1890, and cp. the judgment of James, L.J., in *Ex parte Walton*, 1881, 17 Ch. D. at p. 756.

**Deer.**—See GAME.

**Defacing Advertisement.**—See BOROUGH, Offences, and MALICIOUS DAMAGE.



**Defacing Coin.**—Under sec. 16 of the Coinage Offences Act, 1861, it is a misdemeanour, punishable by imprisonment with or without hard labour for not over one year, to deface any current coin by stamping names or words thereon, irrespective of any question of diminution or lightening. Coin so defaced is not legal tender, and persons tendering such coin are liable to a penalty of forty shillings on summary conviction, recoverable only by consent of the Attorney-General (24 & 25 Vict. c. 99, s. 17); and see COIN, BRITISH.

**Defacing Registers.**—In most if not all the statutes providing for the keeping of a register for public purposes, provision is made for punishing the mutilation or defacement of the register; and under sec. 36 of the Forgery Act, 1861, it is made felony to forge or alter a register, which includes defacing any entry made therein.

**De facto.**—Actually; existing; as a king *de facto*, that is one actually in possession of the throne, as opposed to a king *de jure*, who, although he may have the lawful right to the throne, is not in possession. The Statute 11 Hen. VII. c. 1 provides that persons serving the king *de facto* shall not in respect thereof be attainted of treason.

## Defamation.

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### I. DEFAMATORY WORDS.

Words which injure the reputation of anyone, which make people think worse of him, are defamatory. Yet no general rule can be laid down defining absolutely and once for all what words are defamatory, and what are not. Words which would seriously injure A.'s reputation might do B.'s no harm. Each case must be decided mainly on its own facts, and in each case the test is this: Have the defendant's words appreciably injured the plaintiff's reputation?

If in any given case the words employed by the defendant have appreciably injured the plaintiff's reputation, the plaintiff has suffered an injury which is actionable, without proof of any other damage. Every man has an absolute right to have his person, his property, and his reputation preserved inviolate. And this right is absolute, a *jus in rem*, good against all the world. "His reputation is his property, and, if possible, more valuable than other property" (per Malins, V.C., in *Dixon v. Holden*, 1869, L. R. 7 Eq. at p. 492). "Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter" (per Best, C.J., in *De Crespigny v. Wellesley*, 1829, 5 Bing. at p. 406). In some cases an injury to the reputation of another is treated as a crime; in all cases it is *prima facie* a tort, and actionable, as a rule, without proof of malice in the

defendant, or of special damage caused to the plaintiff. Just as any invasion of a man's property is actionable without proof of any pecuniary loss, so is any serious disparagement of his good name.

It is necessary, however, that the defamatory words should be in some way made public; otherwise the reputation of the plaintiff cannot be impaired. Thoughts are not actionable till they take bodily form. Merely composing, or even writing down, defamatory words is not a tort, unless they be subsequently published. And no cause of action arises if the words be only communicated to the person defamed; for that does not injure his reputation, though it may wound his self-esteem. A man's reputation is the estimate in which others hold him, not the good opinion which he has of himself. It may be that the defendant desired and intended, and did all in his power, to publish words defamatory of the plaintiff, yet if they never reach the ear or eye of anyone except the plaintiff, no action lies. To be actionable, the defamatory words must be published by the defendant to some person other than the plaintiff (see PUBLICATION).

The intention or motive with which the words were published is, as a rule, immaterial. If the defendant has, in fact, injured the plaintiff's reputation, he is liable, although he had no such purpose in his mind when he spoke or wrote the words. Everyone must be presumed to know and to intend the natural and ordinary consequences of his acts; and this presumption (if indeed it is ever rebuttable) is not rebutted merely by proof that at the time he published the words the defendant did not attend to or think of their natural or probable consequences, or hoped or expected that these consequences would not follow. Such proof can only go to mitigate the damages.

Sometimes, however, it is a man's duty to speak fully and freely, and without thought or fear of the consequences; and then the above rule does not apply. The words are privileged by reason of the occasion on which they were employed; and no action lies unless the plaintiff can prove that the defendant was actuated by some wicked or indirect motive (see PRIVILEGE; and ABSOLUTE PRIVILEGE, vol. i. p. 38). But in all other cases (although the pleader invariably alleges that the words were published falsely and maliciously) malice, in fact, need never be proved at the trial: the words are actionable, if false and defamatory, although published accidentally or inadvertently, or with an honest belief in their truth.

It is, however, an answer to any civil action of defamation (though alone it is not a defence to criminal proceedings for libel, see *post*, p. 189) if the defendant can prove that his words are literally true. For, if so, the defendant has not done the plaintiff any wrong; he has merely brought down his reputation to its proper level (see JUSTIFICATION). It is always presumed in favour of a plaintiff that the defamatory words are untrue; so that he need give no evidence that they are false; it is for the defendant to prove that his words are true. The plaintiff, in an action of libel or slander, establishes a *prima facie* case, as soon as he has proved that the defendant published to some third person actionable words which have injured the plaintiff's reputation.

Words which merely depreciate some *thing*, or impugn the plaintiff's *title* to some property, are not defamatory in the strict sense of that term. They may in certain events give rise to an action, but not to an action of libel or slander. Actions for such words are governed by different rules from an action for words defamatory of a *person*. See SLANDER OF TITLE; TRADE LIBEL. Then, again, if any person claiming to be the patentee of any invention threatens any other person with legal proceedings for an

alleged infringement of his patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover damages, if any have been sustained. This, however, is a new statutory cause of action created by sec. 32 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), with a practice and procedure of its own. Lastly, cases may occur in which the words used do not injure the personal reputation of anybody, or disparage the goods which he sells, or impeach his title to any property, and yet if they be uttered with deliberate malice by one who knows that their utterance will undoubtedly cause loss to the plaintiff, and if such loss does in fact follow from their utterance, an action will lie against the defendant for maliciously doing the plaintiff an injury. But that is not an action for defamatory words. It is an action on the case for malicious injury (see *Riding v. Smith*, 1876, 1 Ex. D. at p. 96).

## II. DISTINCTION BETWEEN LIBEL AND SLANDER.

The law attaches considerable importance to the method employed for the publication of defamatory words. If they be merely spoken, they may amount to *slander*. But if they be written, printed, or otherwise permanently recorded, they constitute a *libel*. A libel is necessarily of a somewhat permanent character, not fleeting like spoken words. Thus a statue, an effigy, a picture, or a chalk-mark on a wall may be a libel. To write and publish a libel is a crime as well as an actionable wrong; but to slander a private individual is no crime at all. The same distinction prevails in civil proceedings. If the words be merely spoken, the plaintiff has in certain cases to prove that he has sustained some pecuniary loss as the direct consequence of the defendant's utterance (see *post*, p. 182). But in an action of libel the plaintiff need never show any such pecuniary loss. If indeed such loss has occurred, he is allowed to prove it to enhance the damages; but he can recover judgment without any such proof. Hence in many cases words will be actionable, if written or printed and published, which would not be actionable if merely spoken.

It is not altogether easy to justify this sharp distinction between libel and slander on any clear scientific principle. The origin of the distinction must be sought in the history of the development of our law. But it is now too firmly established ever to be shaken. See *King v. Lake*, 1678, Hard. 470 (Hale, C.B.); *Harman v. Delany*, 1731, Fitz-G. 254 (Lord Raymond, L.C.J.); *Bradley v. Methwyn*, 1737, Selw. N. P. 982 (Hardwicke, C.J.); and *Thorley v. Lord Kerry*, 1812, 4 Taun. 355; 13 R. R. 626 (Sir James Mansfield, L.C.J.). The reasons usually assigned for the distinction are these:—

1. A slander may be uttered in the heat of the moment, and under a sudden provocation; the reduction of the charge into writing and its subsequent publication in the permanent form of a libel show greater deliberation, and raise a suggestion of malice (see *Cook v. Ward*, 1830, 6 Bing. 409; *Dolby v. Newnes*, 1887, 3 T. L. R. 393).

2. Spoken words are fleeting. But written or printed matter is permanent, and no one can tell into whose hands it may come. Everyone now can read. The circulation of a newspaper is enormous; its influence is great; many people implicitly believe every word they see in print. And even a private letter may turn up in after years, and reach persons for whom it was never intended, and so do incalculable mischief. Whereas a slander only reaches the immediate bystanders—who can observe the manner and note the tone of the speaker—who have heard the antecedent

conversation, which may greatly qualify his assertion—who probably are acquainted with the speaker, and know what weight should be attached to any charge made by him; the publicity is thus much less in extent, and the mischief less durable (see *Kelly v. O'Malley*, 1889, 6 T. L. R. at p. 64).

### III. LIBEL

In the first place, a libel must be written or printed or otherwise permanently recorded. It may be written on paper, parchment, copper, wood, or anything else. It may be written with pen and ink, or black lead pencil, or in chalk, or colours. A statue or a picture may be a libel, and so may any other mark or sign exposed to public view and conveying a defamatory meaning. Burning a man in effigy, or fixing up a gallows or other reproachful or ignominious sign against his front door, may be a libel on him (see Lord Coke, *De famosis libellis*, 1598, 5 Co. Rep. 125 b).

Next, the libel must convey to the mind of some third person a definite imputation upon a definite person, and that definite person must be the plaintiff in the action. A. cannot sue for words which are defamatory only of B. And an attack may be made on a *thing* without libelling the individual who owns it (*Australian Newspaper Co. Ltd. v. Bennett*, [1894] App. Cas. 284).

It is not always easy, however, to say beforehand whether a particular document is a libel or not (see *Nevill v. Fine Art, etc., Co. Ltd.*, [1895] 2 Q. B. 156; [1897] App. Cas. 68). It is impossible to define a libel more accurately than by saying that the words must be *defamatory*; that is, they must have injured the plaintiff's reputation, have made people think worse of him, have brought him into ridicule, odium, or contempt. Unless the words are incapable of any defamatory meaning, the judge at the trial will not stop the case. He will explain to the jury the law as to what libel is; he may, if he thinks fit, tell them his own opinion of the words before them; and then he will leave it to the jury, as men of common sense, to say whether the words are a libel or not. See FOX'S LIBEL ACT.

### IV. FAIR COMMENT ON A MATTER OF PUBLIC INTEREST.

But not all defamatory words are actionable, even though they are written or printed and published. Everyone has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose (see LIBERTY OF THE PRESS). Such comments are not libellous, however severe in their terms, so long as the writer truly states his real opinion of the matter on which he comments. And this right is in no way the special privilege of the press. Every citizen has full freedom to speak and to write on such matters. This right therefore is not, strictly speaking, a privilege. Legitimate criticism is no tort; should loss ensue to the plaintiff, it would be *damnum sine injuria* (*Merivale v. Carson*, 1887, 20 Q. B. D. 275). "It is only when the writer goes beyond the limits of a fair comment that his criticism passes into the region of libel at all" ([1894] 1 Q. B. at p. 143). See CRITICISM, *ante*, p. 39.

In order, however, to relieve the defendant from liability, on the ground of fair comment—

(a) The words published must be fairly relevant to some matter of public interest;

(b) They must be the expression of an opinion, and not the allegation of a fact;

(c) They must not exceed the limits of a fair comment;

(d) They must not be published maliciously.

(a) Whether the matter commented on is or is not one of public interest is a question for the judge (per Lopes, L.J., [1894] 1 Q. B. at p. 143). The public conduct of every public man is a matter of public concern. So is the management of every public institution; the conduct of every public body, imperial, local, or municipal; the administration of the poor-law in any locality; and the sanitary condition of any populous district (*South Hetton Coal Co. Ltd. v. North-Eastern News Association Ltd.*, [1894] 1 Q. B. 133). So are all affairs of State (*Parmiter v. Coupland*, 1840, 6 Mee. & W. 105; *Seymour v. Butterworth*, 1862, 3 F. & F. 372; *Wason v. Walter*, 1868, L. R. 4 Q. B. 73); the management of all public institutions and municipal bodies or local authorities (*Purcell v. Sowler*, 1877, 2 C. P. D. 215); all ecclesiastical affairs (*Kelly v. Tinling*, 1865, L. R. 1 Q. B. 699); all books published (*Carr v. Hood*, 1808, 1 Camp. 355 n.; 10 R. R. 701 n.; *Strauss v. Francis*, 1866, 4 F. & F. 1107); all pictures publicly exhibited (*Whistler v. Ruskin*, Nov. 26 and 27, 1878); all public entertainments, theatrical performances, concerts, etc.; all advertisements and other appeals to the public (*Paris v. Levy*, 1860, 9 C. B. N. S. 342; *Campbell v. Spottiswoode*, 1863, 3 B. & S. 769; *Morrison v. Belcher*, 1863, 3 F. & F. 614; *Odger v. Mortimer*, 1873, 28 L. T. 472; *Davis v. Duncan*, 1874, L. R. 9 C. P. 396).

Again, the administration of justice in our law Courts is a matter of public interest. Everyone may comment on any judicial proceeding, on the evidence given, on the conduct of the parties, of the judge, jury, counsel, or witnesses; provided the trial is over, not before. No observations are permitted during its progress, lest the minds of the jury, and indeed of the judge also, should be influenced thereby. Any comment pending action is a contempt of Court, punishable by fine or imprisonment, although the article be written temperately, and with due respect to the Court, and be in all other respects such an article as might properly be published after the trial is ended. And after the case is over, there still are limits to the freedom of criticism allowed. The article-writer is bound to exercise a fair, honest, and impartial judgment, and must not recklessly assail the characters of others or impute to them dishonourable or criminal conduct. Thus, it is not a fair comment on a criminal trial to suggest that the prisoner, though acquitted, was really guilty, or to insinuate that a particular witness committed perjury. And the distinction should be carefully observed between the reports of the proceedings and the leading articles or other comments on them. A report is the record, in a more or less condensed or abridged form, of something that actually took place. A comment is the judgment passed on what took place by someone who has considered the matter, and formed an opinion about it which he states for the benefit of others. These are clearly quite distinct and separate things, and should be kept apart in the paper. Different legal principles apply to them; for whereas fair reports are (as a rule) privileged, fair comments, if on matters of public interest, are not libels at all. So again, where a trial lasts more than one day, daily reports of the proceedings may be published, but no comments may be made on the case till the trial is at an end.

(b) Next, the words complained of must be the expression of an opinion, and not the assertion of a fact. If A. states as a fact that a Government official or a candidate for Parliament did a certain act which he never did, then the fact that if he had done it such conduct would have been a matter of public interest is immaterial. A. must prove his words literally true or pay damages. For they are not a comment on anything; they are

not the expression of an opinion, but a false assertion on a matter of fact. Making unsubstantiated assertions is a very different thing from commenting on well-known or admitted facts. "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct" (*Davis v. Shepstone*, 1886, 11 App. Cas. at p. 190). It is not enough that the writer honestly believed the facts to be as he stated them (*Campbell v. Spottiswoode*, 1863, 3 B. & S. 769; 32 L. J. Q. B. 185). But sometimes a phrase which, when taken by itself, appears to assert a fact, will be found on studying its context to be really only comment on other facts, or an inference from them.

(c) Then, the words must not exceed the limits of a fair comment. As soon as the judge has decided that the matter commented on is one of public interest, the more difficult question arises, "Is the comment on it a fair one?" This is a question for the jury, unless the comment is so clearly fair and legitimate that there can be no question about it.

So long as the writer confines his remarks to the matter of public interest, and makes no attack on the plaintiff apart from that matter, and no false assertion of fact about either, but merely states honestly and boldly his genuine opinion about the matter, then it is very difficult to say that the limits of a fair criticism are exceeded. It is clearly not necessary that the jury should agree with the writer; he is entitled to publish his own opinion, however mistaken or unsound others may think it. The jury are not to be asked whether he formed this opinion with sufficient care or on reasonable grounds. So, too, the fact that his words are strong or even intemperate is not enough to make his criticism unfair. "Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment. Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this: Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said?" (Lord Esher, M. R., in *Merivale v. Carson*, 1887, 20 Q. B. D. at p. 280). If the jury think that no fair man could honestly have come to that conclusion, then and then only are they to find for the plaintiff.

(d) Lastly, the defendant must not have acted maliciously in the matter. The word "fair" in the phrase "a fair comment" refers to the language employed, and not to the mind of the writer. Hence, it is possible that a fair comment should yet be published maliciously. If it is, it would seem that an action lies (see 20 Q. B. D. at p. 281).

## V. SLANDER.

Whenever defamatory words are written or printed and published, there is no necessity for the plaintiff to prove that he has sustained any pecuniary loss in consequence; he rests his case merely on the injury done to his reputation. So when words are spoken, they may be of such a

character that, on the face of them, they clearly must injure the reputation of the plaintiff; such words are said to be actionable *per se* (i.e. actionable without proof of any special damage). But in many cases of slander it is by no means clear from the words themselves that they must have injured the plaintiff's reputation, e.g. where the words are merely idle abuse or expressions of contempt which injure no man's credit; in such cases, therefore, the Court requires proof of some special damage (see *ante*, p. 103). The injury to the plaintiff's reputation is the gist of the action; and where this is not obvious, he must prove to the satisfaction of the jury that he has in fact sustained some appreciable damage for which compensation can be assessed. If the words, being spoken—

- (1) Charge the plaintiff with the commission of a crime; or
- (2) Impute to him a contagious disorder tending to exclude him from society; or
- (3) Are spoken of him in the way of his profession or trade, or disparage him in an office of public trust; or
- (4) Impute unchastity or adultery to any woman or girl;

in all these cases, the words are actionable *per se*, and the plaintiff can recover without proving any special damage. But in all other cases of spoken words, the fact that the plaintiff's reputation has been injured must be proved at the trial by evidence of the consequences that directly resulted from their utterance. Such evidence is called "evidence of special damage," as distinguished from that general damage which the law assumes, without express proof, to follow from the employment of words actionable *per se*. All defamatory words which have in fact caused special damage to the plaintiff are actionable, whether spoken or written.

1. *Words imputing a Crime.*—Any words which impute that the plaintiff has been guilty of a crime punishable with imprisonment are actionable without proof of special damage; it is otherwise if the offence imputed be punishable only by penalty or fine (*Webb v. Beavan*, 1883, 11 Q. B. D. 609). It is not necessary that any particular crime should be specified; it is sufficient if a general charge of felony be made, or words used which imply that the plaintiff ought to be transported or imprisoned for crime. Where, however, the speaker makes no definite charge of actual guilt, but uses words which merely disclose a doubt or suspicion that is in his mind, no action lies, without proof of special damage. Again, it is not necessary that the words should accuse the plaintiff of some fresh, undiscovered crime, for which he could be arrested and tried. Of course, if any such arrest or trial in fact ensued, this can be alleged as special damage; ~~but~~ where such consequences are impossible, the words are still actionable. Thus, to call a man "a returned convict," or otherwise to falsely impute that he has been tried and convicted of a criminal offence, is actionable without proof of special damage; for it is quite as injurious to the reputation of the plaintiff to say that he has in fact been convicted as to say that he will be, or ought to be, convicted.

The words must clearly impute a crime punishable with imprisonment, although they need not state the charge with all the precision of an indictment. If merely fraud, dishonesty, or vice be imputed, no action lies without proof of special damage. And even where words of specific import are employed (such as "thief" or "traitor"), still no action lies if the defendant can satisfy the jury that they were not understood to impute a crime, but merely as general terms of abuse, and as meaning no more than "rogue" or "scoundrel." But if the bystanders reasonably understand the words as definitely charging the plaintiff with the commission of a

crime, an action lies, whatever the defendant may or may not have intended.

2. *Words imputing a Contagious Disease.*—It is actionable to speak any words which imply that the plaintiff is now suffering from leprosy, venereal disease, or the plague—but not smallpox. To state merely that he has had such a disease is not actionable.

3. *Words which injure the plaintiff in his office, profession, or trade* are actionable without proof of any special damage. The plaintiff must hold the office or carry on the profession or trade at the time the words are spoken; and he should always aver this in his pleading. Sometimes this fact is admitted by the slander itself, and then no evidence need be called at the trial in proof of the averment. But in other cases, unless it is admitted on the pleadings, evidence must be given of the special character in which the plaintiff sues. As a rule, it is sufficient for plaintiff to show that he was acting in the office, or actively engaged in the profession or trade, without proving any appointment thereto, or producing a diploma or other formal qualification; but see *Collins v. Carnegie*, 1834, 1 Ad. & E. 695; and *Wakley v. Healey*, 1849, 4 Ex. Rep. 53.

But not all words spoken to the disparagement of an officer, professional man, or trader will *ipso facto* be actionable *per se*. Words, to be actionable on this ground, "must touch the plaintiff in his office, profession, or trade" that is, they must refer to the plaintiff's conduct in that office, profession or trade, and be such as will prejudice him therein. His special office or profession need not be expressly named or referred to, if the charge made be such as must necessarily affect him in it. If a certain degree of ability, skill, or training be essential to the due conduct of the plaintiff's office or profession, words denying his skill and ability, or disparaging his training, are actionable; for they imply that he is unfit to continue therein. But words which merely charge the plaintiff with some misconduct outside his office, or not connected with his special profession or trade, will not be actionable. "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, etc., or connects the imputation with the plaintiff's office, trade, or business" (per Bayley, B., in *Lumby v. Allday*, 1831, 1 Crompt. & J. at pp. 305, 306).

*Offices, Paid and Honorary.*—The distinction between an office of profit and an office which is purely honorary, must be carefully observed. If the office-holder be paid (*i.e.* if he be a judge, a Government inspector, or a beneficed clergyman of the Church of England), an action lies without proof of special damage for any words which impute to him—

- (i.) Serious misconduct in the discharge of his official duties;
- (ii.) Any misconduct, which, if proved against him, would be ground for depriving him of his office, whether such misconduct occur in the course of his official duties or not;
- (iii.) General unfitness or incapacity for his office, such as want of the necessary ability, or lack of the necessary knowledge or education (*Booth v. Arnold*, [1895] 1 Q. B. 571).

But if the office be honorary (*i.e.* if the plaintiff be a sheriff, a justice of the peace, an alderman, town councillor, vestryman, or a clergyman without cure of souls), then an action lies without proof of special damage in the cases (i.) and (ii.), but not in the third case (*Alexander v. Jenkins*, [1892] 1 Q. B. 797).

*Traders.*—If the plaintiff carries on any trade recognised by the law, or is engaged in any lawful employment, however humble, an action lies for



any words which relate to such trade or employment, and "touch" or prejudice the plaintiff therein. Any imputation on the solvency of a merchant or tradesman, any suggestion that he is or has been in pecuniary difficulties, is actionable *per se*. So is any imputation on the competency or skill of anyone practising an art, *e.g.* an engineer, a watchmaker, a dentist, a schoolmaster or an architect. So if the defendant's words impute to the plaintiff cheating, dishonesty, and fraud in the conduct of his trade, such as knowingly selling inferior articles as superior, or wilfully adulterating his wares, they will be actionable *per se*. Words which merely impugn the value of the goods which the plaintiff sells are not actionable, unless they fall within the rules relating to SLANDER OF TITLE (*q.v.*); for they are but an attack on a thing, not on a person. But an attack on a commodity may sometimes be also an indirect attack upon its vendor; *e.g.* if it be insinuated that there was fraud or dishonesty in offering it for sale.

4. *Words imputing adultery or unchastity to any woman or girl* were not actionable at common law. This was frequently denounced as "barbarous" by learned judges; and in 1891 Mr. Milvain brought in a bill, which is now known as the Slander of Women Act (54 & 55 Vict. c. 51), which provides that words spoken and published after 5th August 1891, "which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable. Provided always, that in any action for words spoken and made actionable by this Act, a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action."

Words imputing that a man has been guilty of adultery, profligacy, or immoral conduct are still not actionable, unless it is suggested that such misconduct was committed by the plaintiff in the course of his professional duties, or under colour of some office which he held.

#### VI. CONSTRUCTION AND CERTAINTY.

Whether the words complained of are defamatory or not, or are actionable or not, must in every case depend on the meaning which those words conveyed to those who read or heard them. Before words can injure anyone's reputation, they must be understood, and understood in a defamatory sense. The defendant may have meant one thing and said another; if so, the law will seize on what he said, and disregard what he meant. The test always is, What meaning did the words in fact convey to people who construed them reasonably? "The sense in which the generality of mankind will understand such words is now the rule of construction" (*per cur.* in *Harman v. Delany*, 1731, Fitz-G. 254). In construing wills, contracts, defamatory words, Acts of Parliament, and indeed all legal documents, the first and foremost rule is this: That a man must be taken to mean what he says. The words will not be construed according to the secret intent of the writer; but according to the meaning which such words convey to Englishmen of ordinary sense and capacity. It may be that a defamatory meaning was intended; yet if no third person detected it, no injury has been done to the plaintiff's reputation, and no action lies. It may be that no defamatory meaning was intended, yet if one was in fact conveyed, the defendant is liable. If the readers or hearers could tell that someone was being attacked, but had no clue by which to tell who was meant, then no one's reputation is injured, and the plaintiff cannot recover. It is not enough that the plaintiff himself knew the meaning of the words, and felt their hidden sting. Words are not defamatory unless they convey to some third person a definite charge

against a definite individual. There must be a clear imputation on some person, and that person must be the plaintiff.

1. *Certainty of the Imputation.*—So long as the defendant's words are not absolutely unintelligible, a jury can judge of their meaning as well as anyone else. All obscurity will disappear under the severe scrutiny which the words will receive in a Court of law. It matters not whether the defamatory words be in English, or in any other language that is understood in England, whether they be spelt correctly or incorrectly, whether the phrase be grammatical or not, whether slang terms be employed, or the most refined and elegant diction. The insinuation may be indirect, and the allusion obscure; it may be put as a question or as an *on dit*; it may be disguised in a riddle or in hieroglyphics; the language may be ironical, figurative, or allegorical; still, if there be a meaning in the words at all, the Court will find it out. If a man be compared to "Judas," or "Ananias," or to "the impenitent thief," everyone will understand the allusion (see *Hoare v. Silverlock*, 1848, 12 Q. B. 624; *Woodgate v. Ridout*, 1865, 4 F. & F. 202; *Australian Newspaper Co. Ltd. v. Bennett*, [1894] App. Cas. 284). In cases of this kind, it is simply a question for the jury to decide what meaning the words convey to readers of ordinary intelligence. And they should always read the whole letter or paragraph before deciding that it is a libel. They should have regard to the context. If in one part appears something to the plaintiff's credit, in another something to his discredit, "the bane" and "the antidote" should be taken together; they may be found to neutralise each other. The jury should not dwell on isolated passages, but judge of the publication as a whole, giving its proper weight to every part. Sometimes the sting of a libel will be found in a heading or catchword prefixed to a paragraph otherwise unobjectionable (see *Boydell v. Jones*, 1838, 4 Mee. & W. 446; and *Lewis v. Clement*, 1820, 3 Barn. & Ald. 702; 22 R. R. 530). Sometimes a word at the end of a paragraph may alter its whole meaning, as in *Hunt v. Algar and Others*, 1833, 6 Car. & P. 245. In other cases, words may acquire a defamatory meaning from the position in which they appear, or from the kind of newspaper in which they appear (*Williams v. Smith*, 1888, 22 Q. B. D. 134; see BLACK LIST, vol. ii. p. 161). Thus, the order in which the names of the vocalists are printed on the programme of a concert conveys a meaning in the musical world (*Russell v. Notcutt*, 1896, 12 T. L. R. 195). Placing the wax model of a man in or near the Chamber of Horrors at Madame Tussaud's implies a defamatory meaning (*Monson v. Tussauds, Ltd.*, [1894] 1 Q. B. 671). So in 1809 it was held that suspending a lighted lamp before a house in the daytime conveyed an imputation on the owner of the house (*Jefferies v. Duncombe*, 2 Camp. 3).

In short, if a defamatory imputation be in fact conveyed, it does not matter how it was expressed. It may be hinted or implied, suggested by a question or a mere adjective, hidden under a nickname or couched in some ironical phrase. If the words in their natural and obvious meaning are harmless, still a further question may arise: Were there any facts known both to writer and reader which would lead the latter to understand the words in a secondary and a defamatory sense? This is a question for the jury, provided there be any evidence to go to them of such facts, and provided also it is reasonably conceivable that such facts, if proved, would have induced the reader so to understand the words. This was decided in the leading case of the *Capital and Counties Bank v. Henty & Sons*, 1880, 5 C. P. D. 514; 1882, 7 App. Cas. 741.

2. *Certainty as to the Person defamed.*—To enable a particular plaintiff to come forward and bring an action, not only must the charge be definite,

but it must be clear at whom it is aimed. No plaintiff can sue on a charge which is levied against mankind in general. Still the plaintiff need not be named. It is sufficient if the reader can ascertain who he is. He may be referred to by a nickname, or merely his initials given. As Lord Hardwicke said in 1742: "All the libellers of the kingdom know now that printing initial letters will not serve the turn, for that objection has been long got over." If asterisks be put instead of his name, the plaintiff can sue, if those who know him are able to gather from the libel that he is the person meant. And he can call his friends and acquaintances as witnesses at the trial to state how they understood the words at the time. So if a man write, "I have seen women steal yarn before," it may be clear from the context that what he really means is that a particular woman has been stealing yarn now (*Hart v. Coy*, 1872, 40 Indiana, 553). Again, words which at first sight appear only to refer to A. may yet be also defamatory of B. Thus, to assert that a man is illegitimate is a charge of adultery or unchastity against his mother.

If the words reflect impartially on some one of a certain number or class, and there is nothing to show which one is meant, no action lies. But if the words reflect on each and every member of a certain body or class, then each or all can sue. Thus, if a man libels A.'s brother or A.'s partner, and A. has only one brother or only one partner, that brother or partner can sue; but if the words were, "One of A.'s brothers is perjured," and A. has several brothers, no one of them can sue, unless there are some special circumstances to show to which one the words refer. Still, a general imputation on a class may be ground for an action, if it really refers solely or specially to some particular member of that class. Thus, where a newspaper article imputed that "in some of the Irish factories" cruelties were practised upon the workpeople, and the plaintiffs, who were Irish manufacturers, claimed damages, alleging that their factory was meant, the jury were satisfied from the evidence called before them that the newspaper was referring especially to the plaintiffs' factory, and found a verdict for the plaintiffs; and the House of Lords upheld the verdict (*Le Fanu v. Malcolmson*, 1848, 1 H. L. 637).

## VII. THE INNUENDO.

Whenever it is not obvious from the words themselves who is the person referred to, or what is the imputation cast upon him, the plaintiff should insert in his pleading an averment (which is called an *innuendo*) stating what he understands the words to mean and to whom he supposes them to refer. Thus if the defendant said of a stockbroker, "he is a lame duck," the plaintiff should plead that he was a stockbroker, and that "the defendant falsely and maliciously spoke and published of him the words 'he (meaning the plaintiff) is a lame duck,' meaning thereby that the plaintiff had not fulfilled his contracts in respect of certain stocks and shares which he had bought in the course of his business as a stockbroker." So, whenever the words are *prima facie* innocent or *prima facie* meaningless, the counsel for the plaintiff should be careful to plead an *innuendo* in his statement of claim, to bring out their latent meaning (cp. *Cutler v. Cutler*, 1846, 10 J. P. 169, with *Jacobs v. Schmaltz*, 1890, 62 L. T. 121; 6 T. L. R. 155; and see BLACKLEG, vol. ii. p. 160).

But the innuendo must be a reasonable one; it must be in accordance with the facts; it must not introduce new matter, nor put upon the words a meaning which they cannot fairly bear. It was laid down as long ago as 1599 that "as an innuendo cannot make the person certain which was

uncertain before, so an innuendo cannot alter the matter or sense of the words themselves" (*James v. Rutledge*, 4 Co. Rep. 17 b).

It is always for the judge to determine whether the words used are capable of the meaning which is alleged in the innuendo. If the judge thinks the words are incapable of that meaning, he will stop the case, as was done in *Mulligan v. Cole*, 1875, L. R. 10 Q. B. 549. If the judge thinks the words are reasonably capable of the meaning alleged in the innuendo, then it is for the jury to determine whether the words did in fact convey that meaning to those who heard or read them. And their decision on this question will not be reversed by the Court of Appeal, unless no reasonable men could honestly have come to that conclusion (*Metropolitan Ry. Co. v. Wright*, 1886, 11 App. Cas. 152; *Beamish v. Dairy Supply Co. Ltd.*, 1897, 13 T. L. R. 484).

If the jury find that the words did in fact convey that meaning, and the words in that meaning are actionable, the plaintiff has established a *prima facie* case. But if the jury find that the words did not in fact convey that meaning, still the plaintiff does not necessarily fail; he may abandon his innuendo and fall back upon the words themselves, and say that, taken in their natural and obvious signification, without the alleged meaning, they are defamatory and actionable, and that therefore his unproved innuendo may be rejected as surplusage. But a plaintiff cannot in the middle of the case discard the innuendo in his pleading, and start a fresh one not on the record; he must abide by the construction which he has put upon the words in his statement of claim, or else rely on their natural and obvious meaning (*Simmons v. Mitchell*, 1880, 6 App. Cas. 156; *Ruel v. Tutnell*, 1880, 29 W. R. 172; 43 L. T. 507). If the jury negative his innuendo, and the words are not actionable in their natural and primary sense, judgment must pass for the defendant (*Bremridge v. Latimer*, 1864, 12 W. R. 878; 10 L. T. 816).

The defendant is in no way embarrassed by the presence of the innuendo in the statement of claim; in fact, it is an advantage to him. He can either deny that he ever spoke or wrote the words, or he can admit the words, but deny that they conveyed that meaning. He can also assert that the words are true, either with or without the alleged meaning; that is, he may deny that the plaintiff puts the true construction on his words, and assert that, if taken in their natural and ordinary meaning, his words will be found to be true; or he may boldly allege that the words are true, even in the worst signification that can be put upon them (*Watkin v. Hall*, 1868, L. R. 3 Q. B. 396; the law is otherwise in Ireland, *Hort v. Read*, 1873, Ir. R. 7 C. L. 551). But a defendant may not put a meaning of his own on the words, and say that in that sense they are true; if he deny that the meaning assigned to his words in the statement of claim is the correct one, he must be content to leave it to the jury at the trial to determine what meaning the words naturally bear (*Bremridge v. Latimer*, 1864, 12 W. R. 878; 10 L. T. 816). Nor may he plead, "I did not publish the words set out by the plaintiff; but I did publish some other somewhat similar words, and those other words are true in substance and in fact" (*Russam v. Budge*, [1893] 1 Q. B. 571). If the defendant pleads simply that the words are true, without any reference to the innuendo, he must be prepared at the trial to prove the words true in whatever sense the jury may think it right to put upon them (*Ford v. Bray*, 1894, 11 T. L. R. 32).

#### VIII. CRIMINAL LAW AS TO LIBEL.

To speak defamatory words of a private individual may be an actionable wrong, but it is no crime. To write and publish a libel, on the other hand,

is a crime. The reason is, that a libel is more permanent and more diffusive, and therefore more mischievous, than a slander; hence a criminal remedy is deemed necessary in addition to the civil one. The two remedies are distinct and independent. The object of criminal proceedings is to punish the offender, and to prevent any repetition of the offence; the object of civil proceedings is to compensate the person injured by awarding him damages. This distinction runs through the whole of the criminal law of libel.

But it follows from this statement that not every libel on which a civil action might be brought is ground for a criminal proceeding. The State is interested in repressing all such libels as are calculated to provoke a breach of the peace, or which, for any other reason, tend to disturb the good order of the community or to pervert the morals of the young (e.g. BLASPHEMY, and OBSCENE and SEDITIOUS LIBELS (*q.v.*)). But criminal proceedings should not be taken where the interests of the public are in no way affected, and a civil action for damages would answer every purpose (1 Hawk., P. C. c. 28, s. 3; *R. pros. Vallombrosa v. Labouchere*, 1884, 12 Q. B. D. at pp. 322, 323; *Wood v. Cox*, 1888, 4 T. L. R. at p. 654).

It is then a misdemeanour at common law, punishable with fine and imprisonment, to write and publish defamatory words of any living person, or to exhibit any picture or effigy defamatory of him, provided the publication of such words, or the exhibition of such picture or effigy, is calculated to cause a breach of the peace. The attempt to publish such words, or to exhibit such picture or effigy, is also a crime. A libel on a thing is no crime: and wherever no action would lie without proof of special damage, no indictment or information can be preferred.

While, then, criminal proceedings will not lie in every case in which a civil action can be brought, so, on the other hand, the criminal remedy for libel is in some cases more extensive than the civil. There may be many libels, the circulation of which would be a danger to the State, and which yet might afford no ground for an action for damages. Thus it is a misdemeanour to libel any sect, company, or class of men, without mentioning any person in particular; provided it be alleged and proved that such libel tends to excite the hatred of the people against all belonging to such sect or class, and conduces to a breach of the peace (*R. v. Osborn*, 1792, 2 Barn. 138, 166; *R. v. Gathercole*, 1838, 2 Lew. C. C. 237). Again, criminal proceedings may be taken if the defendant has published a libel on a dead man, provided the obvious tendency of the words is to provoke his family to a breach of the peace (*R. v. Topham*, 1791, 4 T. R. 126; 2 R. R. 348; *R. v. Walter*, 1799, 3 Esp. 21; 6 R. R. 808; but see *R. v. Ensor*, 1887, 3 T. L. R. 366). In neither of these cases would a civil action lie, for want of a proper plaintiff.

The same distinction between the object of civil and the object of criminal proceedings explains the difference between the civil and criminal law as to publication. In civil actions for damages, the plaintiff must prove a publication to some third person; as, without that, there is no injury done to his reputation, and nothing therefore for which he can claim compensation. But it does not matter to the State whether a plaintiff is entitled to damages or not. If the defendant's act is calculated to lead to a breach of the peace, it must be stopped. And a libel published only to the person whom it defames endangers the peace and good order of society, just as much as one addressed to a third person—indeed, it is probably more dangerous. Hence in criminal proceedings it is sufficient for the prosecutor to prove a publication to himself alone (see *R. v. Adams*,

1888, 22 Q. B. D. 66). It is not necessary for him to show that his reputation has been injured; for he is not claiming any compensation for himself, but only seeking to promote the interests of the public.

For the same reason it is no answer to criminal proceedings for the defendant to prove that his words are literally true; he must go further, and show that it was for the public benefit that such words should be published; otherwise there is no countervailing advantage to compensate the public for the risk of a breach of the peace. Indeed, at common law the defendant was not allowed in any case to prove in a criminal trial that his words were true. It was a complete answer to a claim for damages, but it was no defence to a prosecution: for it was thought that the very fact that his words were true would render it more probable that a breach of the peace would follow the publication. This is what is meant by the old maxim, "The greater the truth, the greater the libel." That maxim never applied to civil proceedings for damages; if the charge made by the defendant was true, the plaintiff never could recover any damages. But in criminal proceedings, until the year 1843, the fact that the words were true was regarded as wholly irrelevant. No evidence of that kind was admissible; the attempt to give such evidence was regarded as an aggravation of the original offence. Still, there are many occasions on which it is desirable that the whole truth should be made known, and to this extent the law has been altered by sec. 6 of Lord Campbell's Act, 1843. To any indictment for a libel on a private individual, the defendant is now allowed to plead that his words are true, provided he adds that it was for the public benefit that his words should have been published. But it still remains the law in all cases of blasphemous or seditious libel, that no evidence whatever of the truth of the words will be received.

Other instances were discovered in which the criminal law pressed on individuals who were really innocent with a severity greater than the interests of the public required. Thus it was the rule in both civil and criminal proceedings—and a good and wholesome rule—that a master is liable for all acts of his servant done in the ordinary course of that servant's employment and in pursuance of the master's orders, expressed or implied. This rule pressed very hardly on the proprietor of a newspaper. He was not only liable in damages, but he was also criminally liable, if his editor permitted a libel to appear in the paper, although he himself had never seen it (*R. v. Walter*, 1799, 3 Esp. 21; 6 R. R. 808). Hence Lord Campbell inserted in his Act a clause (now s. 7) which enables the proprietor of a newspaper in which a libel has inadvertently appeared, to prove that such publication was made without his authority, consent, or knowledge, and did not arise from want of due care or caution on his part. Such proof is now an answer to an indictment, although it is still no defence to a claim for damages (see *R. v. Holbrook*, 1877, 3 Q. B. D. 60; 1878, 4 Q. B. D. 42).

Various statutes have from time to time been passed in aid of the common law. Thus, by sec. 3 of Lord Campbell's Act (6 & 7 Vict. c. 96), it is a misdemeanour to publish, or threaten to publish, any libel upon any other person, or to threaten to print or publish, or propose to abstain from printing or publishing, or to offer to prevent the printing or publishing of, any matter or thing touching another, with intent to extort money or gain, or to procure for anyone any appointment or office of profit. The offender may be sentenced to imprisonment for any term not exceeding three years, either with or without hard labour.

By sec. 4 of the same Act, it is a misdemeanour to maliciously publish

any defamatory libel knowing the same to be false ; the punishment may be fine or imprisonment, or both, such imprisonment not to exceed two years.

By sec. 5 of the same Act, it is a misdemeanour to maliciously publish any defamatory libel ; the punishment may be fine or imprisonment, or both, such imprisonment not to exceed one year. This section does not create any new offence, or attempt to define any existing offence ; it merely fixes the punishment to be awarded for the existing common-law misdemeanour of maliciously publishing a libel (*R. v. Munslow*, [1895] 1 Q. B. 758).

By sec. 44 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), it is a felony for anyone knowing the contents thereof, to send, deliver, or utter, or cause to be received, any letter or writing, demanding of any person, with menaces, and, without any reasonable or probable cause, any property or money. Such menace need not necessarily be either a threat of injury to the person or property of the prosecutor, or a threat to accuse him of a crime ; a threat to accuse him of immorality or misconduct may be sufficient (*R. v. Tomlinson*, [1895] 1 Q. B. 706).

By secs. 46 and 47 of the same Act, it is a felony to accuse, or threaten to accuse, another of any infamous crime, whether by letter or otherwise, with intent to extort money or gain. The offender may be sentenced to penal servitude for life, or for any term not less than five years, or to imprisonment with or without hard labour for any term not exceeding two years (see *R. v. Redman*, 1865, L. R. 1 C. C. R. 12 ; *R. v. Ward*, 1864, 10 Cox C. C. 42). As to defamation of parliamentary candidates, see **ILLEGAL PRACTICES**.

In recent years provisions have also been passed in favour of newspapers.

By sec. 8 of the Law of Libel Amendment Act, 1888—

No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the order of a judge at chambers being first had and obtained. Such application shall be made on notice to the person accused, who shall have an opportunity of being heard against such application.

It is found in practice more difficult to obtain an order from a judge at chambers under this section than it was in former days to obtain the *fiat* of the public prosecutor under sec. 3 of the Act of 1881 ; in fact, no order is made under this section where a civil action will meet the requirements of the case, even though the libel be a serious one. No appeal lies from the decision of a judge at chambers under this section, allowing a criminal prosecution to be commenced against a newspaper for a libel published in it (*Ex parte Pulbrook*, [1892] 1 Q. B. 86). And it would seem to follow from the judgments in this case that no appeal would lie in the converse case also, where leave to prosecute has been refused.

By sec. 4 of the Newspaper Libel and Registration Act of 1881—

A Court of Summary Jurisdiction, upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate, and published without malice, and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial on indictment ; and the Court, if of opinion, after hearing such evidence, that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case.

This section was passed in consequence of the decision in *R. v. Sir*

*Robert Carden*, 1879, 5 Q. B. D. 1, where it was held that a magistrate before whom a writer is charged with an offence against sec. 5 of the 6 & 7 Vict. c. 96 (Lord Campbell's Act) had no jurisdiction to receive and record evidence of the truth of the libel; as such a defence could only be raised at the trial upon a special plea framed in accordance with that Act.

If the magistrate decide to dismiss the case, the prosecutor may still, under sec. 2 of the Vexatious Indictments Act (22 & 23 Vict. c. 17), which is made applicable to every libel by sec. 6 of the Act of 1881, require the magistrate to bind him over to prosecute, and the magistrate thereupon is bound to take the prosecutor's recognisance and forward the depositions to the Court to which the indictment will be preferred. If, however, the magistrate does not see his way to dismissing the case, but yet considers that "the libel is of a trivial character," the defendant may still escape the expense and vexation of a prolonged trial at the Assizes or the Central Criminal Court; the magistrate will ask him, "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?" If the defendant consents, the magistrate may then, under sec. 5 of the Act of 1881, summarily convict him and adjudge him to pay a fine not exceeding fifty pounds.

But note that all these sections are confined to the "proprietor, publisher, editor, or any person responsible for the publication of a newspaper" (see EDITOR). The printer is probably included in these words; but the actual composer of the libel certainly is not. No protection is afforded by these provisions to the *writer* of any libel, although he may be a regular reporter or article-writer on the staff of a newspaper. No leave of any judge is necessary to prosecute him, and he will still be bound by the former procedure, and must be committed for trial in the usual way.

*Criminal Information*.—Besides the remedy by indictment, a person libelled can in some cases proceed by way of criminal information. Why there should be two criminal remedies for libel is not clear. Formerly criminal informations were granted very readily. But now, since the decision of the Court in *R. pros. Vallombrosa v. Labouchere*, 1884, 12 Q. B. D. 320, it is very difficult to obtain leave to proceed by this method. Such a special relief is granted only to high officers of State, humbler persons are left to their ordinary remedies by indictment or action. As to costs of criminal information, see COSTS, vol. iii. p. 517.

[*Authorities*.—Odgers on *Libel and Slander*, 3rd ed.; Folkard on *Libel and Slander*, 5th ed.; Fraser on *Libel and Slander*, 2nd ed., and on *Libel in relation to the Press*, 1889.]

**Default (in proceedings in the High Court).**—The word "default" in relation to proceedings in the High Court is generally used to signify the failure of one party or the other to take some step in the action at the proper time, whereby the party so failing becomes liable to certain consequences. Formerly the meaning of the word appears to have been restricted to non-appearance in Court (*Co. Litt.*, 259 *b*), but it has of late been used with a wider significance. Its meaning, however, is still restricted to a failure or non-compliance, which entails consequences on the defaulting party. Thus a plaintiff is in default if he fails to deliver his statement of claim within the time limited, and the defendant may thereupon apply to have the action dismissed; but if a plaintiff served with a defence fails to deliver a reply, he is not therefore in default, but is deemed to have denied and put in issue all the material statements of fact in the pleading



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last delivered (R. S. C. Order 27, r. 13). Default, therefore, in proceedings in the High Court can only be considered in conjunction with its resulting consequences.

*Default of Appearance (by Defendant).*—In all actions, the first and most important step after the issue and service of the writ or summons is the appearance of the defendant. Formerly, both in the Courts of Chancery and Common Law, a defendant who failed to appear was treated as guilty of contempt, and was liable to arrest for the purpose of compelling him to appear. This process was abolished in 1852 (Common Law Procedure Act, 1852, s. 26; Chancery Consolidated Orders, O. 9, r. 2), and with its abolition the attitude of the Court towards the defaulting party underwent a complete change. Since that time such default has been accepted in principle as an admission by the defendant of the plaintiff's claim, and the whole tendency of successive codes of Rules of Court has been to render procedure more and more summary in its operation, so far as regards judgment in favour of the plaintiff on his claim, where the defendant has failed to appear and defend.

In order to obtain judgment against a defendant in default of appearance, a plaintiff suing by writ is put to the preliminary necessity of proving by affidavit that the writ of summons was duly served (Order 13, r. 2). The next step depends upon the nature of the action. If the claim is for a liquidated demand (see LIQUIDATED DEMAND), whether specially indorsed or otherwise; or for detention of goods or damages; or for some or all of these claims combined; or for recovery of land, whether specially indorsed or otherwise, with or without mesne profits, arrears of rent, and damages for breach of the contract under which the premises are held, or for injury to the same, judgment is entered at the judgment department without any order on proof of service of the writ, and of non-appearance by the defendant (Order 13, rr. 3, 5, 7, and 8). If there are several defendants, and one or some of them are in default, judgment may be taken against those in default without prejudice to the plaintiff's right to proceed with the action against the others (Order 13, rr. 4, 6); but in an action for recovery of land the judgment cannot be executed by writ of possession until all the defendants have been made liable to judgment.

In the case of claims for damages, or mesne profits, the judgment is interlocutory for damages to be assessed.

If the defendants, or any of them, are infants or persons of unsound mind, for whom no committee has been appointed, and such defendants make default in appearance, the plaintiff cannot take judgment in default against them until he has first applied for an order appointing a guardian *ad litem*, by whom they may appear and defend (Order 13, r. 1). As to where the plaintiff's claim involves taking an account, see vol. i. p. 76.

It will be seen from the above remarks that judgment in default of appearance can only be obtained in cases where the claim is of an exceedingly simple nature. It often happens, however, that default of appearance is made in actions not comprised in the above list. In such cases the Court, while still adhering to the principle that a defendant's non-appearance is an admission of the plaintiff's claim, requires some further statement of the plaintiff's claim to be brought before it, and also served on the defendant. The service required may be effected by filing the statement of claim in default against the defendant (Order 19, r. 10; Order 67, r. 4; see more fully as to this, SERVICE AND DELIVERY); but the fact that service of statement of claim, though merely formal, has been effected on the defendant, who has failed to appear, renders any judgment subsequently

obtained a judgment in default of defence, and not a judgment in default of appearance.

*Default of Defence.*—In the case of all the claims mentioned in the preceding note on Default of Appearance, if the defendant appears but does not within the time allowed for that purpose deliver any defence, the plaintiff may obtain judgment without order in the same manner as there indicated, with the exception that no evidence of service of the writ is required, the defendant having admitted service by entering his appearance (Order 27, rr. 2-9).

If, however, the claim is of such a kind as to be outside the scope of the rules mentioned—that is to say, one which cannot be made the subject of special indorsement under Order 3, r. 6, and which travels beyond a mere claim for a liquidated sum, or damages, or recovery of land—the plaintiff cannot obtain judgment in default without application to the Court. If there has been no appearance he must file a statement of claim in default against the defendant, and, counting such filing as service on the defendant, must wait until the time for defence has expired. If the defendant has appeared, he must, if so ordered by an order for Directions under Order 39, deliver to the defendant a statement of claim, and wait for the expiration of the time limited for defence. If no defence is then delivered, he must set down the action on motion for judgment, serving the notice of motion at the defendant's address for service, or, in case of no appearance, by filing it in default. On the hearing of such motion, "such judgment shall be given as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to" (Order 27, r. 11).

Where the plaintiff fails to deliver a reply to the defendant's counter-claim, judgment can only be obtained on motion for judgment, even though the claim be for a liquidated demand (*Higgins v. Scott*, 1888, 21 Q. B. D. 10; [1891] 1 Q. B. 221).

*Default by Third Party.*—A person not a party to the action who is served with notice claiming contribution or indemnity under Order 16, r. 48, is bound to appear thereto within eight days. In default of his so doing he is deemed to admit the validity of any judgment obtained against the defendant who has served him with such notice. If the plaintiff in the action obtains judgment by default against the defendant, such defendant may, after satisfying the plaintiff's judgment, take judgment in default against the third party for the indemnity or contribution claimed, including the plaintiff's costs, if claimed in the notice and recovered by the plaintiff's judgment, but without defendant's costs of obtaining judgment against the third party, which cannot be recovered in default of appearance (Order 16, r. 50).

If a third party enters appearance, and an order under Order 30 is made for delivery by him of a defence, and he fails to deliver such defence, the defendant may apply by summons for an order for judgment against the third party.

*Default by Person served with Notice of Judgment.*—Where a person interested in an action for administration of an estate, or execution of a trust, or partition or sale is served with notice of judgment, and fails to appear within the time limited, the plaintiff may, on proof of service, obtain a certificate thereof, and may proceed with the judgment, serving all necessary documents on such person by filing them in default under Order 67, r. 4; and such person will be held bound by the proceedings (Order 16, rr. 40-44).

*Default by Plaintiff.*—If a plaintiff has been ordered under Order 30

(Directions), or under Order 18A (Trial without Pleadings), or under Order 14, r. 8 (Summary Judgment) to deliver a statement of claim and fails to do so, the defendant may apply by summons for an order to dismiss the action (Order 27, r. 1). And where an order for particulars is made against a plaintiff, it frequently contains a clause fixing the time for delivery of particulars, and ordering the action to be dismissed if default is made. Such an order is valid (*Davey v. Bentinck*, [1893] 1 Q. B. 185), and is automatic in its effect, and on default being made the action stands dismissed without further order (*Whistler v. Hancock*, 1878, 3 Q. B. D. 83; *Script Phonography v. Gregg*, 1890, 59 L. J. Ch. 406).

If the plaintiff fails to give notice of trial within the time limited, the defendant may apply for an order to dismiss the action (Order 36, r. 12).

An order to dismiss the action for any of the defaults above mentioned is not final in the sense that it can be pleaded in bar to fresh proceedings (*In re Orrell Colliery, etc., Co.*, 1879, 12 Ch. D. 681); but if the action comes on for trial and the plaintiff does not appear, the defendant is entitled to a judgment of dismissal, which is equivalent to dismissal on the merits (*Armour v. Bate*, [1891] 2 Q. B. 231; *In re Orrell Colliery, etc., Co.*, *supra*; and see the terms of Order 36, r. 12).

As to *Default in giving Discovery*, see DISCOVERY.

*Default of Solicitor.*—A solicitor who is served with an order for discovery on behalf of his client, and who neglects without reasonable excuse to give notice thereof to his client, is liable to attachment (Order 31, r. 23). And a solicitor who gives a written undertaking to appear, or, in an Admiralty action *in rem*, to put in bail or pay money into Court in lieu of bail, and fails to do so, is liable to attachment (Order 12, r. 18). In the Queen's Bench Division, however, it is not the practice of the judges to grant an attachment under this rule until an order has been made on a summons to show cause why the solicitor should not comply with his undertaking, and such order has been disobeyed.

*Non-compliance with a Judgment or Order.*—The various kinds of default coming under this head will be dealt with under EXECUTION, to which their treatment more properly belongs.

**Default by Local Authority.**—Local sanitary authorities have large and varied powers for protecting the health and well-being of the inhabitants of their districts. In many cases the mode in which they shall exercise these powers, or indeed whether they shall exercise them at all or leave them dormant, is left to their discretion; the remedy, in theory, being that the electors will choose different persons to represent them if dissatisfied with the manner in which their councillors exercise these powers. In more important matters, however, Parliament has intrusted the Local Government Board with a controlling power. The cases in which they can interfere are where default has been made (1) in providing or maintaining sewers; (2) in providing a water supply; (3) in enforcing those provisions of the Public Health Acts which it is the duty of a local authority to enforce (38 & 39 Vict. c. 55, s. 299; see Vesey Fitzgerald's *Public Health Act*, 1875, p. 404). In these cases the Local Government Board may order the duty to be performed within a limited time. Such order may (1) be enforced by a writ of mandamus (which the Courts are practically bound to grant, if the Local Government Board have made their order after due inquiry, *R. v. Staines Board*, 1893, 69 L. T. 714); or

(2) the Local Government Board may appoint some person to perform the duty, on behalf and at the expense of the defaulting local authority; the person appointed has all their powers except that of levying rates. In case the default is made by a rural district council, an alternative control is given to the county council, who, on complaint by a parish council of such default, may either transfer to themselves the powers and duties of the district council for the purpose of the matter complained of, or may make such an order as the Local Government Board might make, and appoint a person to perform the duty mentioned in the order (56 & 57 Viet. c. 73, s. 16).

Where a duty is imposed by statute, which otherwise would not exist, and a remedy for default or breach of that duty is provided by the statute which creates it, no other remedy is open to persons aggrieved by reason of such default. Consequently where an individual is injured by the default or non-performance of their duty by a local authority, he can only apply to the body intrusted by Parliament with the power of controlling them, and has no legal remedy either by action for damages (*Robinson v. Workington Corporation*, [1897] 1 Q. B. 619) or by mandamus (*Pebbles v. Oswaldthistle D. C.*, [1897] 1 Q. B. 625).

**Defeasance.**—See *BILLS OF SALE*, vol. ii, pp. 135, 141; *ESTATES*.

**Defect cured by Verdict.**—Under the common law system of pleading where any averment necessary to make the pleading good was defective, *i.e.* was made so imperfectly that the pleading for want of it could have been quashed on demurrer, but the pleading was not challenged, and a verdict was given on an issue involving proof of such averment, the defective averment was held to be cured by verdict. The rule did not apply when an essential averment was wholly omitted, in which case a writ of error would lie after verdict. As to civil pleading, this rule has been rendered obsolete by the changes in the system of pleading, and by the facilities for amendment now open at all stages in a case. In proceedings on indictment the rule still applies (*R. v. Goldsmith*, 1872, L. R. 2 C. C. R. 74; *Hegmann v. R.*, 1873, L. R. 8 Q. B. 102; *R. v. Aspinall*, 1877, 2 Q. B. D. 58; *R. v. Stroulger*, 1886, 17 Q. B. D. 327).

Under sec. 21 of the Criminal Law Act, 1826 (7 Geo. IV. c. 64), the following defects in pleading were declared insufficient to justify staying (by motion in arrest of judgment) or reversing (by writ of error) the judgment recorded, *viz.*: (1) award of jury process to a wrong officer on an insufficient suggestion (see *JURY*); (2) misnomer or misdescription of the officer returning, the process, or of any juror; (3) service on the jury of a person not returned as a juror; (4) description of an offence in the words of a statute which creates it or subjects it to a higher or lower punishment, or deprives the offender of the benefit of clergy. The last of these provisions need be applied only where the Act in question contains no more favourable provision as to the mode of charging the offence which it punishes (*R. v. Stroulger*, 1886, 17 Q. B. D. 327 (corrupt practices); *R. v. Pierce*, 1886, 56 L. J. M. C. 85 (bankruptcy offences)). Except where it applies, an indictment is fatally defective which does not state positively, and not by recital, every material fact and circumstance averred (Archbold, *Cr. Pl.*, 21st ed., 74). The rule is independent of the powers and provisions as to AMENDMENT IN CRIMINAL PROCEEDINGS (*q.v.*).

**Defence Acts.**—The Acts at present in force, extending from 5 & 6 Vict. c. 94 (The Defence Act, 1842), which repealed and consolidated the provisions of previous Acts, to the Defence Acts Amendment Act, 1873 (36 & 37 Vict. c. 72), and the purpose of which is to provide for the purchase of lands and hereditaments necessary to be acquired for the defence of the kingdom, and for barracks, etc., and their vesting in proper persons on behalf of the Crown. By the Defence Act, 1842, lands and hereditaments then held, or thereafter to be purchased, were to become and continue vested in the principal officers of Her Majesty's Ordnance (*q.v.*), in trust for Her Majesty, for the service of the Ordnance Department, or for such other public service as she should by Order in Council direct. The Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 115), transferred to the Secretary of State for the War Department the powers and estates vested in the principal officers of the Ordnance (s. 2).

The intermediate Acts are the Defence Act, 1854 (17 & 18 Vict. c. 67); the Defence Act, 1859 (22 Vict. c. 12); the Defence Act, 1860 (23 & 24 Vict. c. 112); and the Defence Act, 1865 (28 & 29 Vict. c. 65).

In default of purchase being made by agreement, the Acts enable the lands and hereditaments required to be taken by compulsion (ss. 19–30).

**Defence and Counterclaim.**—A defence is the answer of the defendant to the plaintiff's statement of claim or indorsement on his writ of summons, and any cross-claim which he may set up against that of the plaintiff is termed a counterclaim.

First, with regard to the *defence*. It must deal specifically and substantially with all the allegations of facts, except damages, contained in the statement of claim of which the defendant does not admit the truth, for every allegation not denied specifically or by necessary implication or stated to be not admitted is taken to be admitted (Order 19, r. 13, R. S. C., 1883). All special defences, such as fraud, the Statute of Limitations, release, payment, performance, facts showing illegality, the Statute of Frauds, or denial of the right of the plaintiff to claim in any representative capacity, must be specifically pleaded (Order 19, r. 15; Order 21, r. 5); and notice of his intention to rely upon any such ground of defence must be given by the defendant to the plaintiff, within ten days after appearance, in any action which is to proceed to trial without pleadings (Order 18 *a*, r. 5, R. S. C., Nov. 1893). In actions for debt or liquidated demands in money a mere denial of the debt is inadmissible (Order 21, r. 1); the defence must show why the defendant is not indebted. In actions upon bills, notes, bonds, contracts under seal for the payment of a liquidated amount, etc., the defence must deny some matter of fact; for example, if the drawing or acceptance of the bill is denied, this must be done specifically; so also in the case of a claim for goods sold and delivered if it is intended to deny the fact of a sale or delivery having taken place, this also must be done specifically (Order 21, rr. 2, 3). The rules "were expressly intended to prevent a defendant's pleading the general issue, as it was called, and to make him take matter by matter and traverse each of them separately" (Odgers, *Principles of Pleading*, 2nd ed., 181). A defendant is entitled to set up in his defence any matter which has arisen since action brought but before delivery of his defence, and any matter of defence subsequently arising may be set up with the leave of the Court or a judge (Order 24, rr. 1, 2). In an action for the recovery of land, a defendant who is in possession by

himself or his tenant need not plead his title, unless his defence depends upon equitable grounds (*ibid.* r. 21). In such an action (unless in the case just mentioned) it is sufficient for him to plead his possession; this impliedly denies or does not admit the allegations of fact in the statement of claim (*ibid.*).

Where facts are denied or not admitted by a defendant which, in the opinion of the Court or a judge, should have been admitted by him, he may be ordered to pay the additional costs thereby occasioned (Order 21, r. 9).

A defendant may before or at the time of delivering his defence, or later by leave, pay a sum of money into Court by way of satisfaction, or he may do so with a denial of liability except in actions for libel and slander (Order 22, r. 1). The defence must state such payment into Court (*ibid.* r. 2). If the defence alleges a tender before action, the amount so tendered must be brought into Court (*ibid.* r. 3). See PAYMENT INTO COURT; TENDER.

Like other pleadings, the defence should contain only a statement in a summary form of the material facts on which the defendant relies, and the evidence by which those facts are to be proved (Order 19, r. 4). Any point of law may be raised by the defence (Order 25, r. 2). See PLEADING.

*Counterclaim.*—A defendant, besides having a defence to the action raised against him, may have a cross-claim against the plaintiff. Prior to the Judicature Acts this could only be set up in a separate action; now, however, it may be set up in his defence (Order 19, r. 3; Order 21, r. 10), and by this means all the questions in dispute between the parties may be disposed of at one time. It is not necessary that the claim made by the counterclaim should be analogous to that of the plaintiff; a claim founded on tort may be opposed to one founded on contract, or *vice versa* (*Stooke v. Taylor*, 1880, 5 Q. B. D. 576). A counterclaim has the same effect as a cross action, and is treated as an independent action except for the purposes of execution (per Lord Esher, M. R., in *Stumore v. Campbell*, [1892] 1 Q. B. 317). Third parties may be brought in by a counterclaim, in which case a copy of the defence and counterclaim has to be served upon them (Order 21, r. 15). See PARTIES. Power is given to the Court or a judge to order that a counterclaim, which cannot be conveniently dealt with along with the claim of the plaintiff, shall be excluded and be raised in a separate action (*ibid.*).

A counterclaim may be proceeded with although the action of the plaintiff has been stayed or discontinued (Order 21, r. 16). Where a counterclaim is established, and a balance is shown in favour of the defendant, judgment may be given in his favour for such balance, or other relief may be given him (*ibid.* r. 17).

*Time for delivering Defence or Defence and Counterclaim.*—A defence or defence and counterclaim must be delivered within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, or if the defendant has appeared, and has neither received nor required the delivery of a statement of claim, within ten days after his appearance, unless in any case the time is extended by the Court or a judge (Order 21, rr. 6, 7). Where leave is given to defend under Order 14, the defence must be delivered within the time limited, or, if no time is limited, within eight days after the order (*ibid.* r. 8). As to costs of counterclaim, see COSTS.

[*Authorities.*—*Annual Practice*; *Odgers, Principles of Pleading*, 2nd ed.]

**Defence, Confession of.**—Where a defendant in his defence alleges any ground of defence which has arisen since the commencement of the action, the plaintiff may deliver a confession thereof, and may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a judge otherwise orders (Order 24, r. 3, R. S. C. 1883). A form (No. 5) of Confession of Defence is given in Appendix B to the Rules.

In *Newington v. Levy*, 1870, L. R. 6 C. P. 189, Bramwell, B., said that the effect of a plaintiff confessing a defence and taking his costs, was to preclude him from bringing a fresh action unless fresh circumstances arose; but in the later case of *Foster v. Gamgee*, 1876, 1 Q. B. D. 667, in which, however, *Newington v. Levy*, *supra*, was not cited, Blackburn, J., said, in the course of the argument, that confessing a plea did not confess the cause of action, and that the other issues were not thereby disposed of. (See notes on Order 24, r. 3, in *Annual Practice*.)

**Defender of the Faith.**—A title used by the sovereigns of England since it was first conferred on King Henry the Eighth by Pope Leo the Tenth, as a recognition of his controversial writings against Martin Luther. The initial letters of *Fidei Defensor* (F. D.) are still stamped on the coinage of the British Empire.

**Deferred Life Annuity.**—The Government Annuities Act, 1853 (16 & 17 Vict. c. 45), empowers the Commissioners for the Reduction of the National Debt to sell immediate or deferred life annuities to or for the benefit of any depositor in a Savings Bank, or other person whom they think entitled to be or become such a depositor. The deferred annuities can only be granted on single lives. The Commissioners may, if they think fit, refuse to contract for any annuity (s. 13). The annuities may be made payable after the death of the purchaser (s. 15). An extra quarter's annuity is payable to the representatives of the annuitant on his death, provided that a half-yearly payment has previously fallen due (s. 21). The annuities are not assignable except in the case of insolvency or bankruptcy, upon which event they pass to the trustee, and are to be repurchased by the Commissioners (s. 25).

Some sections of the Act (not including those above referred to) have been repealed by the Statute Law Revision Act, 1882. See GOVERNMENT SECURITIES and SAVINGS BANK.

**Deferred Stock.**—By the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119, s. 13), a railway company which, in the year immediately preceding, has paid a dividend on its ordinary stock of 3 per cent., may divide its paid-up ordinary stock into preferred ordinary stock and deferred ordinary stock, and issue the divided stock in place of an equal amount of ordinary stock. The division can only be made at the request, in writing, of the holder of the stock. As between the preferred and the deferred stocks, the former bears a fixed maximum dividend at the rate of 6 per cent. out of the profits applicable to dividend in respect of the undivided stock. The preference is not cumulative. The division does not alter the right of voting, or any privileges, other than the right to dividend, attaching to the stock before division. See, generally, the section cited.

**Preference stocks and shares, and, by consequence, deferred stock and shares, are** very common in companies registered under the Companies Act, and also in statutory companies. In the case of the former, there are no restrictions which limit the arrangements which may be made respecting the relative rights of the holders of the preference and deferred interests. Statutory companies are, of course, governed by their special Acts. The Companies Clauses Act, 1863 (26 & 27 Vict. c. 118, ss. 13, 14, and 15), regulates the issue of preference stock and shares in companies coming within it.

For a form of a clause in a company's memorandum creating deferred shares, see Palmer, *Precedents*, 6th ed., vol. i. p. 155.

[See PREFERENCE STOCK.]

**Defined and Known Channel.**—No riparian rights exist as to subterranean waters unless they are shown to flow in defined and known channels (*Chasemore v. Richards*, 1859, 7 H. L. 349; *Bradford (Mayor) v. Pickles*, [1895] App. Cas. 587). What is a "defined and known channel" was discussed in the Irish case of *Black v. Ballymena Township Commissioners*, 1886, 17 L. R. Ir. 459, where it was said that "defined" means a contracted and bounded channel although the course of the stream may be undefined by human knowledge, and that "known" means the knowledge by reasonable inference from existing and observed facts in the natural or pre-existing condition of the surface of the ground—it is not synonymous with "visible," nor is it restricted to knowledge derived from exposure of the channel by excavation.

**Definition.**—It is now usual in statutes to insert, in an interpretation clause or definition clause, a statement of the meaning intended by Parliament to be applied to them (see Harcastle on *Statutes*, 2nd ed., 173, and INTERPRETATION).

**Definitive Sentence.**—The final judgment of an Ecclesiastical Court, which puts an end to the suit and matter in controversy, under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32, s. 8). Although a definitive sentence has been pronounced, a bishop may subsequently proceed to depose a clergyman, judged guilty under that Act, from Holy Orders without any further formality. See DISCIPLINE, ECCLESIASTICAL.

**Degradation.**—See DISCIPLINE, ECCLESIASTICAL.

**Degree.**—A term used in measuring the proximity of relationship between persons.

See AFFINITY; BLOOD RELATION; COLLATERAL; CONSANGUINITY; PROHIBITED DEGREES.

The term "degree" is also used in criminal law. Accused persons may be principals in the first or second degree; a principal in the first degree being one who is the actor or actual perpetrator of the fact; a principal in the second degree being one present aiding and abetting. (See Archbold, *Criminal Law*, 21st ed., pp. 9 *et seq.*) See ACCESSORY.



**De jure.**—By right; opposed to *de facto* (q.v.).

**Delay.**—See ACQUIESCENCE (vol. i. p. 90). To the cases cited on the question as to barring an equitable claim by delay, add *In re Gallard*, [1897] 2 Q. B. 8; and *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196.

**Del credere Agent.**—A *del credere* agent is a mercantile agent who, in consideration of the payment of an extra remuneration, which is called a *del credere* commission, undertakes to be answerable to the principal for the due performance of the contracts made by him on his behalf. Such an agent is said to act on a *del credere* commission. He is not liable to the principal in the first instance, but only on the default of the parties with whom he contracts, and in effect guarantees the principal against losses through their bankruptcy or insolvency (*Morris v. Cleasby*, 1816, 4 M. & S. 566; 14 R. R. 531; *Hornby v. Lacy*, 1817, 6 M. & S. 166; 18 R. R. 345, not following Lord Mansfield's dictum in *Grove v. Dubois*, 1786, 1 T. R. 112). An agreement by an agent to act on a *del credere* commission is not a promise to answer for the debt, default, or miscarriage of another, within the meaning of the Statute of Frauds, and it is not necessary, that it should be evidenced by writing (*Contourier v. Hastie*, 1852, 8 Ex. Rep. 40; *Sutton v. Grey*, [1894] 1 Q. B. 285). Such an agreement may be inferred from a course of conduct between the parties (*Shaw v. Woodcock*, 1827, 7 Barn. & Cress. 73). Where goods are consigned to a person for sale, and he is permitted to sell at such prices and on such terms as he pleases, and to retain, by way of remuneration, the profit obtained over and above an agreed price, which he undertakes to pay to the consignee within a fixed period after the sale, the question whether the relation between the consignor and consignee is that of vendor and purchaser, or that of principal and *del credere* agent, depends upon the intention of the parties, to be deduced from the circumstances of the particular case (*Ex parte White, In re Nevill*, 1870, L. R. 6 Ch. 397; *Tozele v. White*, 1873, 29 L. T. 98; *Ex parte Bright, In re Smith*, 1879, 10 Ch. D. 566). A *del credere* agent has not, as such, any implied authority to delegate his employment (*Cockran v. Irlam*, 1813, 2 M. & S. 301; 15 R. R. 257).

The fact that an agent acts on a *del credere* commission does not, in general, affect the rights or duties of third persons with whom he contracts (*Houstoun v. Robertson*, 1816, 6 Taun. 448; 16 R. R. 655; *Houstoun v. Bordenave*, 6 Taun. 451; 16 R. R. 657; *Koster v. Eason*, 1813, 2 M. & S. 112; 14 R. R. 603). Thus, it does not affect the right of an undisclosed principal to sue in his own name on the contract (*Hornby v. Lacy*, 1817, 6 M. & S. 166; 18 R. R. 345); nor does it give the agent any right to sue thereon, where he is not otherwise entitled to do so (*Bramwell v. Spiller*, 1870, 21 L. T. 672; 18 W. R. 316). See also FACTOR; PRINCIPAL AND AGENT.

[*Authorities.*—See text-books on PRINCIPAL AND AGENT, a list of which is appended to that article.]

**Delectus personæ**—The choice of a particular individual, on account of some personal qualification (Bell's *Dict.*). The expression appears to have been used in English law books, chiefly with reference to the rule that a new member cannot be introduced into a partnership without

the consent of all the existing partners (Story on *Partnership*, s. 5, and the note to *Crawshay v. Maule*, 1818, 1 Swan. 495, at p. 509; 18 R. R. 126).

Articles of partnership often provide for the introduction of a new partner; for instance, that any partner may introduce a son upon certain terms. See on the construction and effect of such clauses, Lindley on *Partnership*, bk. iii. ch. ix. s. 2. A sub-partner, that is to say a person who has entered into partnership with a partner in respect of such partner's share, is not a member of the firm (see Lindley, bk. i. ch. i. s. 3; *Ex parte Barrow*, 1815, 2 Rose, 251). See PARTNERSHIP.

**Delegates, High Court of.**—The High Court of Delegates was, prior to the Act 2 & 3 Will. IV. c. 92, the supreme Ecclesiastical Court of Appeal. There were also present the delegates appointed in a similar way to hear appeals from the Court of the Admiral (48 Eliz. 15).

[*Authorities.*—Watson's *Clergyman*; *Ecclesiastical Law Commissioners' Report*, 1832; Phillimore, *Ecclesiastical Law*, 2nd ed.; Blackstone *Co*

**Delegation.**—See PRINCIPAL AND AGENT.

**Delineated.**—The meaning of this word was discussed in *Dorling v. Pontypool, etc., Ry. Co.*, 1874, L. R. 18 Eq. 714, in connection with a clause in a railway company's private Act, empowering it "to make and maintain the railways hereinafter described with all proper works, approaches, and stations on the line, and upon the lands delineated on the said plans and described in the said book of reference." Hall, V.C., held that the word "delineated" meant sketched, represented, or so shown that landowners would have notice that the land so sketched, etc., might be taken: it did not mean that the land proposed to be taken should be surrounded on every side by lines. See, however, *Protheroe v. Tottenham and Forest Gate Ry. Co.*, [1891] 3 Ch. 278, where it is suggested that the interpretation given to the word in *Dorling v. Pontypool, etc., Ry. Co.* (*supra*) was perhaps too wide. See Stroud, *Jud. Dict.*

**Deliverance.**—This was the term applied in replevin to the delivery to the owner of the goods distrained. Such delivery was effected by the sheriff or his deputy, upon the owner giving security to try the right of distress (see Statute of Westminster II. c. 2). Formerly a deliverance might occur more than once in respect of the same distress, for where, before the 19 & 20 Vict. c. 108, a judgment of *non pros.* had been obtained in an action of replevin, for the return of the goods to the distrainer, and for damages and costs, the plaintiff was entitled to sue out what was called a writ of *second deliverance* (*ibid.*; 2 Inst. 340; 3 Black. Com. p. 150). This writ commanded the sheriff again to take the goods from the distrainer, and to deliver them to the plaintiff, or, in case the goods had not been returned to the distrainer, operated as a *supersedeas* of the writ commanding their return (*ibid.*; Chitty's *Prac.*, 14th ed., p. 1261). The proceedings upon this writ were the same as in ordinary cases of replevin, and, if the distrainer obtained judgment, the plaintiff could not have any further writ of deliverance (*ibid.*).

**Delivery of Goods.**—See DETENTION OF GOODS; DETINUE; DONATIO MORTIS CAUSÆ; GIFT; and SALE. As to transfers of delivery without a bill of sale, see BILL OF SALE, vol. ii. at p. 129.

A writ of delivery under Order 48, r. 1 (Form 10, App. H), only directs the sheriff to enforce delivery by distress (see *Wyman v. Knight*, 1888, 39 Ch. D. 165), but a writ of assistance directing actual delivery by the sheriff may be ordered to issue (*l.c.*).

**Delivery of Possession.**—The essence of delivery is that the deliveror, by some apt and manifest act, puts the deliveree in the same possession of control over the thing, either directly or through a custodian, which he held himself immediately before the Act (Pollock and Wright on *Possession in the Common Law*, p. 46). The Sale of Goods Act, 1893, s. 61, defines "delivery" as the voluntary transfer of possession from one person to another.

"Livery of seisin," or the delivery of possession of land to hold for an estate of freehold, was formerly of much importance in the law (see *Co. Lit.* 48; 2 Black. *Com.* 311–316; Lightwood on *Possession*, p. 30). And livery was distinguished as either "livery in deed," where the grantor delivered seisin on the land (there being no rival claimant in possession, *Doc v. Taylor*, 1833, 5 Barn. & Adol. 575), or "livery in deed," where the grantor pointed out the land and authorised the grantee to enter, entry being made in the lifetime of the former. See POSSESSION, and Professor Maitland's articles on "Seisin" in the *Law Quarterly Review*, vols. i. ii. and iv.. The learning on this subject has become obsolete since the Real Property Amendment Act, 1845, made all real estate to lie in grant.

Delivery of land or goods may be effected by actual delivery (as above defined) of the whole subject. It may be also effected (a) by symbolic delivery, as by transfer of a bill of lading (*Sanders v. Maclean*, 1883, 11 Q. B. D. 327), or by giving the key of a box containing the goods (Pollock and Wright, p. 65; see *Ward v. Turner*, 1752, 2 Ves. 431, and the notes in 1 White and Tudor's *L. C. i.* p. 1079, and *Ancona v. Rogers*, 1876, 1 Ex. D. 285); or (b) by delivery of part in the course of delivery of the whole, if so intended (*Bolton v. Lanc. and York Ryw. Co.*, 1866, L. R. 1 C. P. at p. 440; *Kemp v. Falk*, 1882, 7 App. Cas. 573, at p. 586); or (c) without actual change of custody, by the actual custodian agreeing to hold as bailee for the deliveror. The last two cases are described as "constructive delivery." The common instances of (c) are where a seller undertakes to hold for the buyer (see *Elmore v. Stone*, 1809, 1 Taun. 458; 10 R. R. 578; *Marrin v. Wallis*, 1856, 6 El. & Bl. 726; *Castle v. Swarder*, 1861, 6 H. & N. 828; see *Evans v. Roberts*, 1887, 36 Ch. D. 196, and the cases next cited), or a third person, who is holding as bailee for the deliveror, with the assent of both parties undertakes to hold for the deliveror (*Farina v. Home*, 1846, 16 Mee. & W. 119; *Godts v. Rose*, 1855, 17 C. B. 229; *Cochrane v. Moore*, 1890, 25 Q. B. D. 57).

As between husband and wife, the possession of goods in the house which they both occupy may be passed from one to the other by any event which passes the property in the goods to the deliveror (*Kilpin v. Ratley*, [1892] 1 Q. B. 582; *Ramsay v. Magrett*, [1894] 2 Q. B. 18).

To pass possession, delivery must be made "with intent to transfer separate, undivided, and exclusive control to the deliveror" (Pollock and Wright, p. 129), that is, of the thing delivered, which may be a partial interest, *e.g.* an undivided moiety of something else. So a delivery made

by a mistake or induced by fraud, affecting in either case the intent to deliver, may be void (*Pollock and Wright*, p. 100; *Godts v. Rose*, 1855, 17 C. B. 229; *R. v. Ashwell*, 1885, 16 Q. B. D. 190; and cp. the cases of larceny by a trick, *R. v. Buckmaster*, 1887, 20 Q. B. D. 182). So also the delivery of a desk containing valuables not known to be there, is no delivery of possession of the valuables (*Merry v. Green*, 1841, 7 Me. & W. 623; cp. *South Staffordshire Waterworks Co. v. Sharman*, [1896] 2 Q. B. 44).

Goods in the custody of a servant, as such, are in the master's possession; the servant is not a bailee (*Hopkinson v. Gibson*, 1805, 2 Smith, 202; 8 R. R. 709; *Pollock and Wright*, p. 138).

Delivery of possession of land in execution of a judgment can be enforced by a "writ of possession" (as to which, see R. S. C., Order 47; *ibid.* Appendix H, No. 8; Chitty, *Archbold's Practice*, 14th ed., p. 1227; Williams and Yates on *Ejectment*, p. 266). Specific delivery of chattels, if directed by a judgment (as to which, see DETINUE), may be enforced, as against the defendant to the action by a "writ of delivery" (see Order 48), and as against third parties, in a proper case, by a "writ of assistance" (*Wyman v. Knight*, 1888, 39 Ch. D. 165).

An order for the delivery of possession of DESERTED PREMISES (11 Geo. II. c. 19, ss. 16, 17; 57 Geo. III. c. 52; 3 & 4 Vict. c. 84, s. 13), or of small tenements in which the tenant's interest has expired or been determined (1 & 2 Vict. c. 74, s. 1), may be obtained by a landlord from the justices. And provision for such orders is made in a number of special cases, e.g. schoolhouses, allotments, encroachments on enclosures, and parish lands (see Williams and Yates on *Ejectment*, p. 5).

Within the metropolitan police district, a magistrate can order the delivery to their owner of goods there detained without just cause, and not exceeding £15 in value (2 & 3 Vict. c. 71, s. 40). The magistrate's decision is no bar to an action for the goods (*Dorer v. Child*, 1876, 1 Ex. D. 172).

See further, POSSESSION, and CONVERSION, ACTION OF. As to delivery in pursuance of a contract of sale, see SALE, and Roscoe's *Nisi Prius Evidence*, 16th ed., pp. 531-545. As to delivery by instalments, see SALE.

**Delivery Order.**—The name is used to describe both a written order by the bailor of goods, directing the warehouseman or other bailee to deliver them to the deliverer (see cases below), and a written undertaking by the person in possession of goods that he himself will deliver them (see *Grice v. Richardson*, 1877, 3 App. Cas. 319). In practice, such orders are often treated as if they were negotiable instruments, passing by mere delivery the title to the goods (*Blackburn on Sale*, 2nd ed., p. 415). But this is not the case, although a person dealing with the holder of a delivery order, in good faith and without notice of any vendor's lien, is protected by the Factors Act, 1889, and the corresponding sections of the Sale of Goods Act, 1893 (ss. 25, 47), in cases falling within these enactments. Giving a delivery order does not constitute delivery of the goods, if the goods are in the possession of a third person, until such person has acknowledged that he holds them for the deliverer (Sale of Goods Act, 1893, s. 29 (3); *M'Ewan v. Smith*, 1849, 2 H. L. 309), nor, until then, does its receipt constitute an acceptance of the goods within the meaning of sec. 17 of the Statute of Frauds (Sale of Goods Act, 1893, s. 4; *Bentall v. Burn*, 1824, 3 Barn. & Cress. 423). So that, subject to the above-mentioned enactments, and any special custom that a delivery order waives the vendor's rights (*Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, 1877, 5 Ch. D. 205), a vendor

who has given a delivery order on a third person can still exercise his right of stoppage *in transitu* (*M'Ewan v. Smith, supra*). A delivery order given by a vendor in possession of the goods is no more than a promise to deliver them, and the mere delivery of it makes no change in their possession (*Gillman v. Carbutt*, 1889, 37 W. R. at p. 439), and accordingly the vendor's lien is not ousted by it (*Grice v. Richardson, supra*), but this is subject to the Sale of Goods Act, 1893, s. 25.

If a bailee negligently gives two delivery orders, he will be estopped from showing that they relate to the same goods, as against a claimant who has dealt with the orders for value (*Coventry v. Great Eastern Ryw. Co.*, 1883, 11 Q. B. D. 776).

A delivery order is a "document of title" within the Factors Act, 1889 (s. 1 (4)), and the Sale of Goods Act, ss. 25, 47 (s. 62 (1)). See PRINCIPAL AND AGENT and SALE.

If the goods concerned are of the value of forty shillings, and are lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, the order must have a penny stamp, but it is not rendered invalid by reason of being unstamped, unless the holder were party or privy to some fraud on the revenue in relation thereto. It is the duty of the deliverer to stamp the order (Stamp Act, 1891, ss. 69, 70, 71).

**Delivery or Transfer.**—It is an indictable misdemeanour, punishable by imprisonment, with or without hard labour, for not over one year, for any person, whether bankrupt or not, to make or cause to be made, with intent to defraud his creditors or any of them, any gift, delivery, or transfer of, or any charge upon, his property (*R. v. Rowlands*, 1881, 8 Q. B. D. 330; Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 13 (2); see also BANKRUPTCY).

**Demise.**—See LANDLORD AND TENANT; LEASE.

**Demise of the Crown.**—This is the expression made use of to signify that on the death of the sovereign the kingship is *eo instanti* by act of law, without any interregnum or interval vested in his successor, according to the maxim, "the king never dies." Cp. Blackstone (1 *Com.* 249). Important legal consequences formerly attended on the demise of the Crown. The king's peace, the source of the Crown's criminal jurisdiction, came to an end with his death, and had to be proclaimed again. Civil actions in the royal Courts also abated, and had to be commenced anew. Parliament was dissolved, and likewise the Privy Council. All offices, civil and military, under the Crown were vacated. Most of these inconveniences have now been removed by statute. As to civil and criminal proceedings, see 4 Will. & Mary, c. 18, s. 6; 1 Anne, stat. 1, c. 8. Parliament is no longer affected by a demise of the Crown (30 & 31 Vict. c. 102, s. 51). The Privy Council, and officers, civil and military, were to continue in office for six months unless sooner dismissed by 6 Anne, c. 7, s. 8, and this period is extended to eighteen months in the case of offices in the colonies by 1 Will. IV. c. 4, s. 2. The tenure of the judges is not affected by the demise of the Crown since 1 Geo. III. c. 23.

By 7 Will. IV. and 1 Vict. c. 31, commissions in the army and marines are continued until dissolved. In case of the absence of the new sovereign on

a demise of the Crown, 7 Will. IV. and 1 Vict. c. 72 provides for the appointment of lords justices to carry on the government until he returns. The Act imposes certain restrictions upon them, as that they are not to dissolve Parliament, or to give the royal assent to certain classes of bills. The arrangement between the Crown and Parliament embodied in the Civil List Act (see LIST (CIVIL)) comes to an end with the death of the sovereign; and the surrender of the hereditary revenues to the use of the public at the beginning of a new reign does not operate beyond the life of the sovereign making the surrender (*Lord Advocate v. Douglas*, 4 St. Tri. N. S. 738). See further, Chronological Index to the Statutes under *Crown*; *Demise*.

**Demolish.**—By the Malicious Damage Act, 1861, it is made felony for rioters to demolish or begin to demolish any church, chapel, meeting-house, or other place of divine worship, or any house, stable, or any of the other buildings enumerated in the section.

Under the Housing of the Working Classes Act, 1890, s. 33, local authorities are empowered to make orders for the demolition of houses which are unfit for human habitation; and under the London Building Act, 1894, the London County Council may obtain similar orders in respect of buildings erected in contravention of the Act.

[See further, Stroud, *Jud. Diet.*]

## Demurrage.

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Demurrage may be generally defined as a compensation paid by the shipper of goods to the shipowner for delay in taking his goods on board or out of the ship which carries them, whether under a charter-party (C/P) or bill of lading (B/L) (see per Lord Esher, M. R., *Harris v. Jacobs*, 1885, 15 Q. B. D. 247). "The days which are given to the charterer in a charter-party either to load or unload without paying for the use of the ship, are the lay days; then days are sometimes given also in favour of the charterer, which are called 'demurrage days.' These are days beyond the lay days, but during which he has to pay for the use of the ship in a fixed sum" (*ibid.*, *Nielsen v. Wait*, 1885, 16 Q. B. D. 70). This "fixed sum" may be an agreed rate of compensation for every "day," "weather working day" or "hour," occupied in loading or unloading beyond the lay days.

The word demurrage, however, besides its strict meaning of an agreed compensation for delay in loading or discharging a ship, also includes damages becoming due to the shipowner for the detention of the ship in breach of the charter-party or bill of lading; such damages may be in addition to demurrage proper, as when the ship is detained during all the agreed days on demurrage and longer, or they may be payable without any demurrage proper being due, if the charter-party does not provide for days on demurrage (*Carver, Carriage by Sea*, 609). The term is also used, perhaps improperly, of detention of ships due to collisions, and their claims for

compensation against the wrongdoer (see COLLISIONS, vol. iii. p. 99, *Measure of Damages*).

"The word 'demurrage' no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument (charter-party or bill of lading); but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charter-party containing the clause in question we must collect what is the proper meaning to be assigned to it" (Cleansly, B., *Lockhart v. Falk*, 1875, L. R. 10 Ex. 132; and see per Bowen, L.J., *Clink v. Radford*, [1891] 1 Q. B. 625).

The difference between these two chief senses of the word is generally only of importance in connection with the "cesser clause" (see below). As said already, before demurrage can become due either in the proper or in the popular sense, the "lay days," or time allotted for loading and unloading as the case may be, must have expired; and accordingly the following points chiefly require consideration:—(a) What lay days are allowed by the charter-party; (b) when the lay days begin; (c) who are the persons liable for demurrage; (d) the means of enforcing demurrage, especially with reference to the cesser clause.

(a) *Lay Days allowed by the Charter-Party*.—The number of lay days may be either expressly defined by the charter-party, or determined by inference or reference from its terms, e.g. "within so many days," or "according to the usual despatch of the port," or "in the usual and customary time," or "at the rate of so many tons per day." If no reference or inference is to be found in the terms of the charter-party, the charterer is then bound to load or discharge, as the case may be, within a reasonable time.

Where the time is expressly stated, the charterer binds himself by his contract to finish loading or discharging within that time, and he is not excused because he is prevented by circumstances beyond his control, e.g. the crowded state of the port (*Randall v. Lynch*, 1810, 2 Camp. 352), frost (*Barret v. Dutton*, 1815, 4 *ibid.* 333), bad weather (*Thiis v. Byers*, 1876, 1 Q. B. D. 244), or the act of a foreign Government (*Blight v. Page*, 1801, 3 Bos. & Pul. 295 n.; *Barker v. Hodgson*, 1814, 3 M. & S. 267). He is not excused even by the inability of the shipowner to do his part of the work, if this be not due to the shipowner's fault (see *Thiis v. Byers*, above; *Potter v. Burrell*, [1896] 1 Q. B. 97; *Budgett v. Binnington*, [1891] 1 Q. B. 35). Even if the delay be due to the shipowner's negligence, the charterer is not excused unless the shipowner's failure to do his part makes it impossible for the charterer to do his, i.e. unless there are no other means available to the charterer of performing his contract (*ibid.*, 1890, 25 Q. B. D. 327). *A fortiori* the merchant is not excused if his failure to discharge or load within the specified time be due to circumstances within his control (*Petersen v. Freebody*, [1895] 2 Q. B. 294). On the other hand, if the shipowner by his fault causes the delay, the merchant is not liable, for the lay days do not begin; e.g. shipowner not addressing the ship to the charterer's agent as agreed in the charter-party (*Bradley v. Goddard*, 1863, 3 F. & F. 638), or not having the ship ready to give delivery of her cargo (*Hansen v. Donaldson*, 1874, 1 Seas. Ca. (4th) 1066); and the law is the same where the ship is directly disqualified from loading or discharging, e.g. by quarantine (*White v. S.S. Winchester Co.*, 1886, 13 Seas. Ca. (4th), 524) or delay in getting custom-house papers, unless this is due to the charterer's fault (*Farnell v. Thomas*, 1828, 5 Bing. 188; *Hill v. Idle*, 1815, 4 Camp. 327). Where the time for loading (or unloading) is fixed, and nothing is

said as to the manner of loading (or unloading), it is understood that the customary manner is that contemplated by the contract; and for delay in this owing to a *vis major* the merchant will be liable, unless he expressly protects himself by his contract (*Smith v. Rosario Nitrate Co.*, [1894] 2 Q. B. 174; *Crawford v. Wilson*, 1896, 1 Com. Cas. 154 and 277, "restraints of princes and rulers" held to cover delay due to hostilities at the port of loading).

Lay days are often described in charter-parties as so many "days," or "running days," or "working days," in which the ship must be loaded or discharged. It has been judicially decided that in the absence of custom, "days" mean all days, whether working or non-working days, and include Sundays and holidays (Lord Esher, M. R., and Lindley, L.J., *Nielsen v. Wait*, 1885, 16 Q. B. D. 67); but custom may make "days" equivalent to "working days," and exclude Sundays and holidays (*Cochran v. Retberg*, 1800, 3 Esp. 121). The context, too, may vary the ordinary meaning, see, e.g., *Hooper v. McCarthy*, 1806, 2 Bos. & Pul. N. R. 258. "Running days" mean the same as "days" in a charter-party or bill of lading (*Brown v. Johnson*, 1842, 10 Mee. & W. 331), and are not equivalent to consecutive days as "days running" would be, although the consequence of the stipulation is that, in the absence of custom to the contrary, the days or running days run consecutively, for the work must be carried on without a break (Cotton, L.J., *Nielsen v. Wait*, above). "Working days" exclude holidays observed in the port of discharge, but not local holidays not observed by the persons loading or discharging the ship, or days on which bad weather prevents work being done (*Holman v. Peruvian Nitrate Co.*, 1878, 5 Sess. Ca. (4th) 657). "Holidays" mean those so observed at the port of loading or discharge, not those observed by the ship, for the provision is in favour of the charterer (*ibid.*, see *Niemann v. Moss*, 1860, 29 L. J. Q. B. 206).

If the loading or despatch is to be "with the usual despatch of the port," or in the "usual and customary time," the time taken must not exceed that ordinarily taken at the port (*Kearson v. Pearson*, 1864, 31 L. J. Ex. 1; and see *Ashcroft v. Crow Orchard Colliery Co.*, 1874, L. R. 9 Q. B. 540; *Rodgers v. Forrester*, 1810, 2 Camp. 483).

If by the charter-party the discharge is to be "as fast as ship can deliver," the consignee must take delivery as fast as a ship, working reasonably, can deliver under the conditions and with the means available at the port of delivery (*Wyllie v. Harrison*, 1885, 13 Sess. Ca. (4th) 92; *The Jaderen*, [1892] Prob. 357; *Good v. Isaacs*, [1892] 2 Q. B. 555); and if the loading or discharging is to be done "in the usual and customary manner" (or some similar words), this refers primarily to the manner, and only secondarily to the time, of loading or discharging (Bovill, C.J., *Tapscott v. Balfour*, 1872, L. R. 8 C. P. 52; Brett, L.J., *Nelson v. Dahl*, 1879, 12 Ch. D. 588; Fry and Lopes, L.J.J., *Castlegate S.S. Co. v. Dempsey*, [1892] 1 Q. B. 854).

Where no time is fixed either expressly or by reference or inference, it is the duty of the charterer to use reasonable despatch in performing his part, and to load or discharge in a reasonable time. What is a "reasonable time" is determined by the actual circumstances existing at the time (and not by ordinary circumstances), so far as they are not caused or contributed to by the conduct of the charterer or consignee (see *Hick v. Raymond*, [1893] App. Cas. 27; *Postlethwaite v. Freeland*, 1880, 5 App. Cas. 621; but see *Wright v. New Zealand Shipping Co.*, 1879, 4 Ex. D. 165; the difference between this case and the last being that in the former there was no reference to the customary manner of discharge, per Lord Selborne, *Postlethwaite's case*, above; Lord Herschell, *Hick v. Raymond*, above; see also



*Castlegate S.S. Co. v. Dempsey*, [1892] 1 Q. B. 854). If the charterer's obligation is only to load or discharge within a reasonable time under the actual circumstances, he is not liable for delay caused by circumstances beyond his control (*Ford v. Cotesworth*, 1868, L. R. 4 Q. B. 133, and 8 *ibid.* 544). The excuse of *vis major* will not, however, avail the charterer in case the cargo or the appliances for loading or unloading it, if under his control, are not ready when the ship arrives; though if they are under the control or management of a port authority, a reference to the discharge being made according to the custom of the port will relieve the charterer from liability for the delay (*Wright's case*; *Postlethwaite's case*; *Wyllie v. Harrison*, 1885, 13 Sess. Ca. (4th) 92; *The Alne Holme*, [1893] Prob. 173). See CARGO.

Where a ship is to be loaded "in regular turn," or "in regular turns of loading," and the ship is ready at the proper place and does not get her turn, the charterer is liable for her detention (Carver, 620). What a "turn" is depends on the practice of the port or the understanding between the parties (*Lawson v. Burness*, 1862, 1 H. & C. 396).

(b) *When Lay Days begin.*—Before lay days will begin to run at a port of loading, notice of the ship's arrival there must be given to the charterer (*Stanton v. Austin*, 1872, L. R. 7 C. P. 651); but this is not necessary to make lay days run at the port of discharge, whether the ship be a chartered or a general one, unless the contract so stipulates. See AFFREIGHTMENT and CARGO.

The general rule is that the lay days begin to run when the ship reaches the place agreed upon for loading or discharging, and is ready to load or discharge her cargo, as the case may be: but difficulty may arise in the application of the rule, *i.e.* deciding at what point or place the ship can be considered as an "arrived" ship; and the determination of this question depends on the nature of the place to which the ship has to go in order to fulfil her contract. An exhaustive statement of the law on this point may be found in the judgment of the present Master of the Rolls (then Brett, L.J.), in *Nelson v. Dahl* (1879, 12 Ch. D. 568), which has been recognised in the later decisions as an authoritative classification of the rights and liabilities of shipowners and charterers as to loading and discharging. The propositions laid down in it and subsequent cases are very concisely stated in the argument in a recent case (*Sanders v. Jenkins*, [1897] 1 Q. B. 93) as follows: (1) where a *port* is named, the lay days begin at the usual place of discharge there, or at the place to which the charterers have ordered the ship to go; (2) where a *dock* is named, the lay days begin when the ship is in it, and not at a particular place in it; (3) where a *berth* is named, the lay days do not begin till the ship reaches the berth. Examples of (1) may be found in *Brereton v. Chapman* (1831, 7 Bing. 559, Port of Wells); *Brown v. Johnson* (1842, 10 Mee. & W. 331, Port of Hull); *Kell v. Anderson* (*ibid.*, 498); and *Randall v. Lynch* (1810, 2 Camp. 352, Port of London); see, too, *Pyman v. Dreyfus* (1889, 24 Q. B. D. 152) and *Sanders v. Jenkins* (above). Examples of (2) are afforded by *Toppscott v. Balfour* (1872, L. R. 8 C. P. 52); *Monson v. Macfarlane* ([1895] 2 Q. B. 563). An example of (3) is to be found in *Tharsis Co. v. Morel* ([1891] 2 Q. B. 647), in which the previous case of *Murphy v. Coffin* (1883, 12 Q. B. D. 87) was approved, and those of *The Carisbrook* (1890, 15 P. D. 95) and *Dall'Orso v. Mason* (1876, 3 Sess. Ca. (4th) 419) were overruled.

To these three rules with regard to the beginning of lay days at the port of loading or discharge must be added a fourth, namely, that if the ship is prevented from reaching the agreed place for loading or discharging

by obstacles caused by the freighter, or other engagements entered into by him, the lay days will begin as soon as the ship is ready and waiting to go to that agreed place (Carver, 627) (see *Ashcroft v. Crow Orchard Colliery Co.*, 1874, L. R. 9 Q. B. 540; and *Tillett v. Carron Iron Works*, 1886, 2 T. L. R. 675). But where by the charter-party the charterer is given an option of choosing the berth to which the ship is to go, he may exercise it by naming a berth in which the ship has to wait for a considerable time for her turn, if the lay days are not fixed (*Pyman v. Dreyfus*, 1889, 24 Q. B. D. 182; *Tharsis Co. v. Morel*, [1891] 2 Q. B. 647); although he must not "order the ship unreasonably to a berth that is not ready within a reasonable time" (Lord Blackburn, *Nelson v. Dahl*, 1881, 6 App. Cas. 44); for "the option is given for the benefit of the person who has to exercise it. He is bound to exercise it in a reasonable time, but is not bound in exercising it to consider the benefit or otherwise of the other party. The option is to choose a port, or berth, or dock, that is, one that is reasonably fit for the purpose of delivery, not one the entrance to which is blocked—that would be practically no exercise of the option. . . . To limit the option of the charterer by saying that in the choice of a berth he is to consider the convenience of the shipowner, is to deprive him of the benefit of the option. The most that can be said is that he does not exercise his option at all unless he chooses a berth that is free, or likely to be so in a reasonable time" (Bowen, L.J., *Tharsis Co. v. Morel*, ante; *Bulman v. Fenwick*, [1894] 1 Q. B. 179) (strikes excepted).

In the absence of custom to a contrary effect, where the charter-party contains the clause, "so near thereunto as she may safely get," the ship is an "arrived" ship, and the lay days will begin to run when the ship arrives at a place where, by the usage of the port, she discharges part of her cargo (i.e. lightens), and then completes her discharge at her final destination; and in the absence of a contrary custom the days will run on continuously, not excluding the time spent in moving from one place to another; but if such a custom is proved, it will govern the case (*Nielsen v. Wait*, 1885, 16 Q. B. D. 67 and 75, Port of Gloucester). If such a clause be absent from the charter-party, it is doubtful if the place where the ship lightens need be in the ambit of the port of destination or not, in order to make the lay days begin to run; but if the charter-party does include such a clause, it makes no difference whether the partial discharge be made within the port of destination or not (*McIntosh v. Sinclair*, 1877, 12 L. R. 11 C. L. 456; *Dickinson v. Martin*, 1874, 1 Sess. Ca. (4th) 1185).

The charterer is not liable for delay after the loading is completed, e.g. by ice, or not getting clearances owing to the custom-house being burnt down (*Barrel v. Dutton*, 1815, 4 Camp. 333; *Pringle v. Mollett*, 1840, 6 Mee. & W. 80; *Jameson v. Laurie*, 1796, 6 Bro. P. C. 474).

Part of a demurrage day counts as a day (*Commercial S.S. Co. v. Boulton*, 1875, L. R. 10 Q. B. 346; *Hough v. Athya*, 1879, 6 Sess. Ca. (4th) 961). Days are generally counted according to the calendar, and not as periods of twenty-four hours (see *The Katy*, [1895] Prob. 56); but as a rule, the day on which the ship reaches the place of discharge, being occupied in preparation, does not count, and the lay days do not begin till the following morning (*Allan v. Johnstone*, [1892] 19 Sess. Ca. (4th) 364); though if the claim is for damages for detention, all the actual time lost is counted (Carver, 631). But where the charter-party provided that the cargo should be loaded at a certain rate "per weather working day," it was held that a day on which, in spite of bad weather, a substantial amount of work was done, counted as half a day, though not amounting to half a day,

and that a day on which substantially a full day's work, though not amounting to twelve hours, was done, counted as a full day, no smaller fraction than half a day being taken into consideration, and the time worked, if quite insignificant, not being charged at all (*Branchelow v. Lamport*, [1897] 1 Q. B. 571).

Where the ship is to load and discharge at a fixed rate, and that rate is not reached in loading, though it is exceeded in discharging (or *vice versa*), the two operations are considered as distinct, and the gain made by the charterer on one is not allowed to be deducted from his liability on the other, unless the charter so stipulates (*Marshall v. Bolckow*, 1881, 6 Q. B. D. 231; *Avon S.S. Co. v. Leask*, 1890, 18 Sess. Ca. 280; *Molière S.S. Co. v. Naylor*, 1897, 2 Com. Ca. 92; *Rowland v. Nilson*, 1897, 13 T. L. R. 459; *Laing v. Holloway*, 1878, 3 Q. B. D. 437).

Demurrage clauses are construed strictly: thus where "forty running days were allowed for loading at Cardiff and unloading at Alexandria, to commence on December 16th," and at the shipowner's request the charterer agreed to load part of the cargo at Pembroke (where the ship then was) and complete at Cardiff, and ten days were taken at Pembroke, forty days at Cardiff, and ten days at Alexandria, the charterer was held liable for twenty days' demurrage which was "payable December 16th, wherever the ship might be" (*Jackson v. Galloway*, 1838, 5 Bing. N. C. 71; so *Black v. Balleras*, 1860, 29 L. J. Q. B. 261; *Sweeting v. Darthez*, 1854, 23 L. J. C. P. 131; *Lanuzy v. Werry*, 1717, 4 Br. P. C. 630; *Marshall v. De la Torre*, 1795, 1 Esp. 365; Carver, 635).

(c) *Persons liable for Demurrage*.—Primarily the person liable to pay demurrage is the person who makes the contract of sea carriage with the shipowner, *i.e.* under a charter-party the charterer, under a bill of lading the shipper.

Under a charter-party the charterer is generally liable for demurrage, even though other persons may also be responsible, *e.g.* shippers or bill of lading holders, unless the shipowner has dealt with the bill of lading holders in a manner inconsistent with the charter-party (Carver, 644).

Under a bill of lading the shipper, if he retains the bill of lading, is liable for demurrage, unless he assigns it with the goods to another person, when, if the latter presents it and demands delivery of the goods, he thereby offers to perform the terms of the bill of lading on which the goods are delivered to him (Cave, J., *Allen v. Collart*, 1883, 11 Q. B. D. 782; and see *Leer v. Yates*, 1811, 3 Taun. 387). But, on the other hand, a qualified acceptance of the goods will not make the consignee or indorsee of the bill of lading liable for demurrage (*S.S. County of Lancaster v. Sharp*, 1889, 24 Q. B. D. 158). Under the Bills of Lading Act, however (whatever would be the case without it), a consignee or indorsee of a bill of lading, to whom the property in the goods has passed, is bound by the implied promise in the contract to be reasonably diligent in taking delivery of the goods (Carver, 639, quoting *Fowler v. Knoop*, 1878, 4 Q. B. D. 299).

Bills of lading do not generally specify any time within which the goods must be loaded or discharged, unless the ship is a chartered one and the bills of lading incorporate the provisions of the charter-party in this respect; but in any other case the only liability of the shipper or his assignee, or the consignee of the goods, is to be reasonably diligent in loading or discharging the goods (see above).

In order to incorporate the terms of the charter-party, the bill of lading must refer clearly thereto: the words "goods being deliverable on payment of freight and all other conditions as per charter-party" cover

demurrage at the port of discharge if the charter-party gives a lien for demurrage (*Wegener v. Smith*, 1854, 15 C. B. 285; *Porteous v. Watney*, 1878, 3 Q. B. D. 534): while the words "goods deliverable to consignees on their paying for goods as per charter-party" have been held not to cover demurrage (a lien for it being given by the charter-party) at the port of loading (*Smith v. Siercking*, 1857, 4 El. & Bl. 445, and 5 *ibid.* 589; cp. *Gray v. Carr*, 1871, L. R. 6 Q. B. 523). See BILLS OF LADING.

Where there are several bills of lading given for different parcels of cargo on board a ship, and each contains a demurrage clause, the consignee of one parcel may be liable to pay demurrage for delay in getting delivery of his goods, even though that delay is only caused by the goods of the other consignees being stowed on the top of his goods (*Leer v. Yates*, 1811, 3 Taun. 387; *Straker v. Kidd*, 1878, 3 Q. B. D. 223; *Porteous v. Watney*, *ibid.* 227 and 534); Lord Tenterden's decisions to the contrary effect cannot be supported (*Rogers v. Hunter*, 1827, Moo. & M. 63; *Dobson v. Droop*, 1832, *ibid.* 441). There may, however, be a difference between shipment in a general and in a chartered ship; and in the former case in the absence of agreement to be answerable for delay in discharging any part of the cargo, one shipper may not be liable for delay caused by the act of another (*Carver*, 641).

It is a doubtful point whether each holder of a bill of lading is liable for demurrage to the shipowner after other holders have paid it; and it may make a difference whether the contractual liability to demurrage arises under a charter-party incorporated by reference into the bills of lading or under the express terms of the bill of lading itself. In *Porteous v. Watney*, *ante*, Brett, L.J., stated that "it would be no defence for the holder of the bill of lading to say that the shipowner had been paid the same sum by all other holders of bills of lading for cargo in the ship, for he would have no right to prove another and wholly independent contract between the shipowner and the holders of the other bills of lading." Thesiger, L.J., however, in the same case suggested that the fact that "the condition in the charter-party as to demurrage has been performed, though not by the particular consignee, might constitute in equity, if not in law, a defence to an action for demurrage brought against the particular consignee" (*Porteous v. Watney*, *ante*); and *Carver* approves this view (642).

The right to sue for demurrage or detention of the ship is vested in the shipowner who has made the contract, unless the master has made it, and has specially stipulated with regard to the time and mode of unloading (*Jesson v. Selby*, 1811, 4 Taun. 52; *Carvethorn v. Trickett*, 1864, 33 L. J. C. P. 182); but the master cannot sue for demurrage if it be only a breach of an implied condition in a bill of lading (*Brouncker v. Scott*, 1811, 4 Taun. 1; *Heans v. Foster*, 1830, 1 Barn. & Adol. 118; *Carver*, 643).

(d) *Means of Enforcing Demurrage, and the Cesser Clause.*—The right to demurrage under charter-parties and bills of lading is generally secured by the contract giving the shipowner a lien on the cargo for (*inter alia*) demurrage, on condition of the charterer being released from any liability in respect of it. A clause to this effect known as the "cesser clause" is generally inserted in the charter-party under which the goods are shipped (for the origin of it, see CHARTER-PARTY); and is in this or a similar form, "charterer's liability to cease when the ship is loaded, the captain having a lien for freight, dead freight, and demurrage." The cesser clause may, however, provide that the charterer's liability shall cease altogether, without any compensating lien; in that case the presumption is that the charterer's liability is to cease only as regards matters subsequent

to the loading; while it remains unimpaired as to matters previous to the loading (*Christophersen v. Hanson*, 1872, L. R. 7 Q. B. 509); for "unless the wording of the clause is expressed in terms so clear that we cannot get rid of it, the Court will be inclined to construe it as not applicable to a breach of contract complained of, if by so construing it the Court will leave the shipowner unprotected as to that breach of contract" (Lord Esher, *Clink v. Radford*, [1891] 1 Q. B. 625).

Examples of cesser clauses of the absolute kind, *i.e.* giving complete release from liability with no compensating lien, are afforded by *Milvain v. Perez*, 1861, 30 L. J. Q. B. 90; *Oglesby v. Yglesias*, 1858, 27 L. J. Q. B. 356; *Lister v. Van Huansbergen*, 1876, 1 Q. B. D. 269; but they are not common.

Whether a lien is given or not, the cesser clause covers breaches of contract arising *after* the cargo is loaded (*French v. Gerber*, 1877, 1 C. P. D. 737, and 2 *ibid.* 247). "Where the words of the absolving part of the clause plainly show that all liability is to cease on loading, it ceases both as to antecedent and future liabilities, and without any regard to any lien; but where the words of the absolving part are open to either interpretation, the liability as to antecedent breaches is to cease only so far as an equivalent lien is given" (Brett, J., *ibid.*).

In spite of a cesser clause (whether an absolute or a partial one), the charterer may yet be liable for demurrage if he holds the bills of lading for the cargo; for the clause does not apply to the contract contained in the bill of lading (*Gullischen v. Stewart*, 1883, 11 Q. B. D. 186); and a charterer has been held liable as holder of a bill of lading for detention at an intermediate port on the voyage (*Bryden v. Niebuhr*, 1885, 1 C. & E. 241).

With regard to cesser clauses in the common (*i.e.* partial) form given above, the points to which consideration has been mainly directed are—(1) whether the charterer's liability ceases as to the past (*i.e.* before loading) as well as to the future; (2) whether the cesser of liability applies to detention at the port of loading as well as demurrage proper.

As regards (1), it has been judicially intimated that on principle the cesser of liability should only be applied to liabilities subsequent to the loading, leaving antecedent liabilities of the charterer untouched; but it has at the same time been admitted that the weight of judicial authority in favour of the opposite view is too great to be displaced (*Kish v. Cory*, 1875, L. R. 10 Q. B. 553); and it is now the accepted presumption in cases where the charterer's liability is replaced by a lien and to the extent of that replacement that the words "liability to cease on loading" refer to antecedent as well as subsequent liabilities of the charterer (*Francesco v. Massey*, 1873, L. R. 8 Ex. 101; so *Kish v. Cory*, above; *Dannister v. Breslauer*, 1867, L. R. 2 C. P. 497, where a lien for "demurrage" given by charter-party was held to include detention at the port of loading, and the charterer's liability was at an end; but this last case has been severely commented on, and "can only be supported on the ground that no other meaning would be given to the word 'demurrage' in that charter-party, and no other extent to the lien to be created than by including in demurrage damages for detention at the port of loading" (Bowen, L.J., *Clink v. Radford*, [1891] 1 Q. B. 625)).

As regards (2), the general rule deducible from the cases seems to be that the lien for demurrage given in the ordinary cesser clause will include damages for detention at the port of loading whenever it is not expressly confined to compensation for delay at the port of discharge, if a rate of demurrage is mentioned in the charter-party which is applicable to delay by

detention at the port of loading (see *Gray v. Carr*, 1871, L. R. 6 Q. B. 522; *Sanguinetti v. Pacific S. N. Co.*, 1877, 2 Q. B. D. 238; *Restitution S.S. Co. v. Pirie*, 1889, 61 L. T. 330, and 6 T. L. R. 50); and to the same effect see *Francesco v. Massey*; *Bannister v. Breslauer*, *ante*; and *Kish v. Cory*, *ante*.

On the same principle the lien for "demurrage" given by the cesser clause has been held not to apply to detention at the port of loading in the following cases:—Under charter-party, that "cargo should be loaded in the customary manner, and should be discharged in ten working days, demurrage at £2 per 100 tons register per day" (*Lockhart v. Falk*, 1875, L. R. 10 Ex. 132); under charter-party, that "cargo should be loaded as customary at Sydney, and be discharged as customary at . . . and at the rate of not less than 100 tons . . . per working day, . . . and ten days on demurrage over and above said laying days at fourpence per register ton per day," and the cesser clause was to come into effect "on cargo being loaded, provided cargo is worth freight at port of discharge" (*Gardiner v. Macfarlane*, 1889, 16 Sess. Ca. (4th) 658); under charter-party, that "coal cargo should be loaded in the usual and customary manner, and discharged at the rate of 100 tons per working day, no rate of demurrage being mentioned for the port of loading, but demurrage being payable if cargo was not discharged at the specified rate" (*Link v. Radford*, [1891] 1 Q. B. 625); under a charter-party, that "the ship was to be loaded as customary, and discharged as customary at average rate of not less than 100 tons per working day from the time that she was in berth and ready to discharge, demurrage at the rate of £20 a day" (*Dunlop v. Balfour*, [1892] 1 Q. B. 507).

[*Authorities*.—Carver, *Carriage by Sea*; Scrutton, *Charter-Parties*.]

**Demurrer.**—This was the term formerly applied to the mode in pleading of disputing the sufficiency in law of the pleading of the other side (Bullen and Leake, *Precedents of Pleading*, 3rd ed., p. 819). It was called "demurrer" from the Latin *demorari*, or the French *demorrer*, to wait or stay, because it imported that the party pleading it would go no further, but would wait the judgment of the Court as to whether he was bound to answer his opponent's pleading (Stephen on *Pleading*, 7th ed., p. 43).

The effect of a demurrer was to admit for the purposes of the demurrer that all the matters of fact alleged in the opposite pleading were to be taken as true, but at the same time to deny that they were sufficient in their legal effect to support the claim or defence set up by the other side (Bullen and Leake, *Precedents of Pleading*, 3rd ed., p. 820; Stephen on *Pleading*, 7th ed., p. 140).

Formerly demurrers were of two kinds, namely, *general* and *special*. They were described as *general* when no particular ground of objection was alleged, and as *special* when the particular grounds of objection were set down and expressed (Bullen and Leake, *Precedents of Pleading*, 3rd ed., p. 819; 1 Chitty on *Pleading*, 7th ed., p. 694). The Statutes 27 Eliz. c. 5 and 4 Anne, c. 16, provided that no objection should be taken to mere defects of form by *general* demurrer, so that after the passing of those statutes, defects in form could only be taken advantage of by *special* demurrer, and *general* demurrer was available only in cases of defects in substance (*ibid.*). *Special* demurrers were subsequently abolished by sec. 51 of the Common Law Procedure Act, 1852, and while provision was made by that Act for either party objecting by demurrer to the pleading of

the opposite party on the ground that such pleading did not set forth sufficient ground of action, defence, or reply, as the case might be, it was enacted that the Court in giving judgment on such demurrer should not regard any imperfection, omission, defect, or lack of form in the pleading.

A party whose pleading was demurred to, might by leave of the Court or a judge amend such pleading, or, if he did not amend it, he had to join in demurrer. Originally it was not permissible to both plead and demur to the same pleading, but this was modified in the Superior Courts of Common Law by sec. 80 of the Common Law Procedure Act, 1852, which enacted that either party might, by leave of the Court or a judge, plead and demur to the same pleading at the same time.

On the coming into operation of the Judicature Acts, demurrers in civil proceedings in the High Court of Justice became regulated by Order 28 of the now-repealed rules of 1875, which embodied for the most part the rules and principles then in force in the Superior Courts of Common Law with respect to demurrers. Now, by Order 25 of the R. S. C., 1883, demurrers have been abolished so far as pleadings in the Queen's Bench and Chancery Divisions are concerned, and other pleadings have been substituted in place thereof (see *PROCEEDINGS IN LIEU OF DEMURRER*).

Demurrers in criminal cases still exist, but they are comparatively of rare occurrence since the passing of 14 & 15 Vict. c. 100, as to which see *AMENDMENT IN CRIMINAL PROCEEDINGS* (see Archbold's *Criminal Pleading*, 21st ed., p. 143).

[*Authorities.*—All the leading authorities are enumerated in the text.]

**Denariate**—An old measure of land, believed to represent an acre. See Elphinstone, *Interpretation of Deeds*, 572, 598.

**Denizen**—An alien to whom the sovereign has, by letters patent under the Great Seal, granted some of the privileges of a British subject. Denization has been described as “a kind of middle state” between being an alien and a British subject (see Stephen's *Commentaries*, vol. ii. p. 438).

Before 7 & 8 Vict. c. 66 (1844), denizens enjoyed practically the same privileges as naturalised British subjects, but this Act enabled the latter to hold public offices and places of trust. Denizens were not mentioned in the Act, and their position consequently remained as before. The Act of 1870 provides that nothing therein shall affect the grant of Letters of Denization (33 & 34 Vict. c. 14, s. 13).

A denizen cannot inherit real property, nor bequeath it to collateral relations, or to such of his children as were born before the grant of his letters patent; he cannot become a member of either House of Parliament or Privy Council, and no grant of land can be made to him by the Crown (12 & 13 Will. III. c. 2, s. 3).

When a denizen is in any foreign State other than his country of origin, he has the full status of a British subject.

No residence, past, present, or prospective, is required in order to become eligible for denization, and it is almost entirely owing to this fact that the status still survives. Mr. Hall observes as to this: “There have been, and from time to time there no doubt will be, persons of foreign nationality

to whom it is wished to intrust functions which can only legally be exercised by British subjects. In such instances the condition of five years' residence in the United Kingdom would generally be prohibitory. The difficulty can be avoided by the issue of letters of denization; and it is believed that on one or two occasions letters have in fact been issued with the view of enabling persons of foreign nationality to exercise British consular jurisdiction in the East" (*Foreign Jurisdiction*, p. 34).

[*Authorities*.—Bacon's *Abridgment*, title "Alien" (B); Cockburn on *Nationality*, p. 28; Cutler, *The Law of Naturalisation*, London, 1871, pp. 5, 6; Hall, *Foreign Jurisdiction of the British Crown*, Oxford, 1894.]

**Denman's (Lord) Act.**—This name is applied to 6 & 7 Vict. c. 85, passed at the instance of the first Lord Denman when Lord Chief-Justice of the Court of Queen's Bench. It has now received the statutory short title of the Evidence Act, 1843 (59 & 60 Vict. c. 14, sched.).

It abolished disqualification of witnesses by interest or crime (s. 1), and provided for the mode (see EVIDENCE; JURY) of stating in legal proceedings that a juror had affirmed instead of taking the oath.

**Denman's (Mr.) Act.**—The Act 28 & 29 Vict. c. 85, so called because it was passed at the instance of the Hon. George Denman (late Justice of the High Court) while he was in Parliament. It has now been rechristened the Criminal Procedure Act, 1865 (see 59 & 60 Vict. c. 14, sched.); it deals with the giving and summing-up of evidence in criminal cases. See EVIDENCE; JURY.

**De non decimando.**—"A prescription *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them" (2 Blackstone, *Com.* 31). See TITHES.

**Denshiring.**—This term, which is a corrupt form of Devonshiring (the practice having been first employed in Devonshire), is applied to the method of clearing or improving waste land by spreading over it the ashes of burnt turf, weeds, etc., to form a compost. The process is also called burn-beating.

**Dentist.**—Probably the earliest reference to the art of dentistry in the statute-book appears in 32 Hen. VIII. c. 42, s. 3 ("For barbers and surgeons"), where it is enacted that "no manner of person within the city of London . . . using barbery or shaving . . . shall occupy any surgery, letting of blood, or any other thing belonging to surgery, drawing of teeth only except"—"and hence this art fell into, or rather perhaps remained almost entirely in, the hands of the barbers, and until a recent period was not cultivated by the surgeons as even ancillary to their calling" (Weightman, *The Medical Practitioners' Legal Guide*, 1870, p. 146). According to the *Encyclopædia Britannica* (article, Dentistry): "For long it was practised to a large extent as a superadded means of livelihood by persons engaged in some other pursuit, and without any professional education whatever." For an explanation of this state of things, and a slight notice of the progress



of the art to legal regulation, the article cited may be referred to. The Medical Act of 1858 provided that Her Majesty might, by charter, grant to the Royal College of Surgeons of England power to examine, with a view to testing whether the candidates were fit to practise as dentists, and to grant certificates to such candidates (s. 48). Nothing in this Act (21 & 22 Vict. c. 90) was to prejudice or in any way to affect "the lawful occupation, trade, or business of chemists and druggists and dentists" (s. 55).

In 1878 was passed the Dentists Act (41 & 42 Vict. c. 33)—the charter of the profession. The following is a summary of its provisions:—

*A. Registration:* After August 1, 1879, no one is to call himself a dentist, or take any name implying that he is registered under this Act, or that he is a person specially qualified to practise dentistry, unless he is registered under this Act; but this does not apply to legally qualified medical practitioners. Penalties are denounced against offenders, and prosecutions may be undertaken by certain defined public bodies (especially by the General Council established by the Act of 1858) and (since the Medical Act of 1886, 49 & 50 Vict. s. 26) by any private person. After the date above mentioned only registered persons or legally qualified medical practitioners are entitled to recover any fee or charge in any Court for dental work, etc. The persons entitled to be registered are—(a) licentiates in dental surgery or dentistry of any of the medical authorities; (b) those entitled to be registered as foreign or colonial dentists; (c) those "at the passing of this Act *boni fide* engaged in the practice of dentistry or dental surgery, either separately or in conjunction with the practice of medicine, surgery, or pharmacy." The last class had to satisfy the registrar of their *bona fides*. Residents in the United Kingdom need not be British subjects to be registered, nor are British subjects outside the United Kingdom debarred thereby from registration. In certain appropriate circumstances, a man with a recognised certificate may be registered as a colonial dentist without examination in the United Kingdom, and there is a similar registration of a foreign dentist; what constitutes a recognised certificate in both these cases depends on the General Council, but there is an appeal to the Privy Council. The General Registrar (of the General Council) must keep in the Dentists' Register one alphabetical list of all United Kingdom dentists (*i.e.* classes (a) and (c)), one for colonial and one for foreign dentists, and there are various regulations as to the control of the Council over these registers. The General Registrar may erase from his register the name of a person who has ceased to practise, but not, speaking generally, without that person's consent. The Council may erase from the register an entry incorrectly or fraudulently made, and the name of a practitioner convicted of crime or guilty of disgraceful conduct, and a name so erased shall also be erased from the list of licentiates above referred to; but no man's name shall be erased "under this section on account of his adopting or refraining from adopting the practice of any particular theory of dentistry or dental surgery." A name so erased may be restored if the Council thinks fit, and there is to be a permanent committee of the Council to deal with cases of erasure and restoration. In *R. v. The Medical Council* ([1897] 2 Q. B. 203) the Court of Appeal held that an applicant who was at the time of the passing of the Dentists Act articulated as a pupil within the meaning of sec. 39, but had not made the declaration required by sec. 7 (*i.e.* before August 1, 1879), was not entitled to be registered. The right to registration of a pupil whose articles expired on or after August 1, 1879, and before January 1, 1880, was left uncertain (*ibid.*).

*B. Examination:* "Notwithstanding anything in any Act of Parliament,

charter, or other document," any of the medical authorities who have power to grant surgical degrees may examine persons who wish to practise dentistry and may grant certificates, and the holder of such a certificate shall be a licentiate in dental surgery or dentistry of the body granting it; the candidate must be at least twenty-one years old. The following bodies may appoint boards of examiners in dental surgery or dentistry to conduct the examinations mentioned:—The Royal College of Surgeons of Edinburgh, the Faculty of Physicians and Surgeons of Glasgow, the Royal College of Surgeons in Ireland, and any university in the United Kingdom. The Royal College of Surgeons of England shall continue to examine and grant certificates (as above). The Act contains many provisions as to examinations in dentistry. A certificate under this Act confers no right or title on the holder to be registered under the Medical Act, 1858, in respect of such certificate, nor any recognition of him by law as a licentiate or practitioner in medicine or general surgery. The Act contemplated the establishment of medical boards, and provided for their conduct of examinations, but such institutions do not seem to have come into existence (see the Act of 1886, 49 & 50 Vict. c. 48, s. 26).

Persons registered under this Act may, if they desire, be exempt from serving on all juries and inquests, and from serving all corporate, parochial, ward, hundred, and township offices, and from serving in the militia. The penalty for obtaining registration under this Act by false representations is fine, or imprisonment not exceeding twelve months. Penalties may be recovered in England under the 11 & 12 Vict. c. 43, in Scotland under the 27 & 28 Vict. c. 53, and in Ireland under the 14 & 15 Vict. c. 93 (and certain special statutes for Dublin), or under the Acts amending these Acts.

Sec. 26 of 49 & 50 Vict. c. 48, deals with "Dentists," but its material enactments are included above.

In *Ex parte Partridge* (1887, 19 Q. B. D. p. 467), a Divisional Court held that where a person has been registered under the Act of 1878 as a licentiate of a medical authority, the fact that his diploma has since been revoked by such medical authority does not render him liable to be erased from the Dentists' Register under the Act, and granted a mandamus to the General Council to restore the name of one Partridge to that register. The Council appealed to the Court of Appeal, but the decision of the Court below was affirmed.

Mr. Partridge then (in 1890) brought an action in respect of the period during which his name had been removed from the register, but the judge (Huddleston, B.) held in *Partridge v. General Council of Medical Education and Registration of the United Kingdom* (1890, 25 Q. B. D. p. 90) that the functions exercised by the General Council under secs. 11 (5) and 13 respectively being discretionary, and not merely ministerial, whether they acted under one or the other, they were not liable to an action for the erroneous exercise of their discretion in the absence of *mala fides*. Upon appeal, the Court of Appeal affirmed this judgment.

Prosecutions have generally proceeded under sec. 3 of the Act. Since the decision of a Divisional Court in *The Royal College of Veterinary Surgeons v. Robinson*, [1892] 1 Q. B. 557, prosecutions (which have mainly been instituted by the British Dental Association) have taken a somewhat wider range. Thus a conviction was secured where a person not on the register issued cards with the words "Dental Surgery" following his name, and had the same words, as well as "English and American dentistry," "Painless dentistry," etc., on his premises, and this though he proved that

the lessee of the premises was a qualified practitioner who was frequently there, and that he was his servant (58 *J. P.* p. 321). There was also a conviction where the defendant issued a long circular with a telegraphic address, "Dentist, Manchester," advertising his "Free Dentorium or Dental Consulting Rooms," and "teeth extracted"; the defence was that he did not act or practise as a dentist, and that there was a duly-qualified person on the premises (*ibid.* p. 778). In the first of those cases, and perhaps in the second, it will be observed that the defendant did not anywhere state in so many words that he was a qualified dentist or even a dentist at all.

At the present moment (1897) the profession considers itself hampered by the decision of the House of Lords in *The Pharmaceutical Society v. The London and Provincial Supply Association Limited* (1880, 5 App. Cas. 857), where (shortly) it was held that a company could do that which a "person" might not, namely, describe itself as druggists, pharmacutists, etc. (and, therefore, presumably as dentists), and accordingly an attempt is being made to introduce the following (or a like) clause into bills amending the Companies Acts:—"No company shall be registered under a name which shall include or consist of a name, title, sign, description, or addition which cannot by law be taken, used, or exhibited by a natural person, unless such person has a personal qualification."

**Deodand.**—Under the old law a chattel which was found by the presentment of a jury to be the immediate cause of the death of a person, either by accident or by homicide, was termed a deodand, and was forfeited to the Crown to be applied to pious uses.

The Statute 9 & 10 Vict. c. 62 abolished these forfeitures altogether from and after 1st September 1846.

[*Authorities.*—See 1 Black. *Com.* 300–302.]

**Depart.**—In a marine policy the phrase "warranted to depart on or before" the specified day from the particular port means that the vessel shall have departed from that port and be at sea by the given day (*Moir v. Royal Exchange Assurance Co.*, 1814, 4 Camp. 84; 16 R. R. 330). With this case, however, should be compared *Van Baggen v. Baines*, 1854, 9 Ex. Rep. 523, where it was decided that a term in a charter-party that the ship should "leave Amsterdam" not later than a particular day, meant no more than that she should have left the harbour, not necessarily that she should by that day have sailed on her voyage.

A person who with intent to defeat or delay his creditors "departs out of England" or "departs from his dwelling-house" commits an act of bankruptcy (Bankruptcy Act, 1883, s. 4, subs. (d); Williams, *Law of Bankruptcy*, 6th ed., pp. 18, 19). See BANKRUPTCY.

**Department of State**—A branch of the Government. The various departments of State are classified by Sir W. R. Anson (*Law and Custom of the Constitution*, Part II., 2nd ed., ch. iv.) as follows—(1) offices of the household which are now filled by the Lord Steward, Lord Chamberlain, and Master of the Horse; (2) political offices, including the various secretariats, the Privy Council, Admiralty (the), Board of Trade, Local Government Board, etc.; and (3) the various non-political executive offices, *e.g.* the Customs and Inland Revenue Departments. • The functions of each depart-

ment are dealt with under its separate title. See also EXECUTIVE GOVERNMENT.

**Depeculation.** (*Depeculari*)—A term used in the seventeenth century for plunder by peculation, and in particular of official misconduct in robbing prince and commonwealth or the public treasury or revenue. Such acts, if now made the subject of prosecution, are dealt with under the statutes relating to larceny or embezzlement, or by a common law indictment for official misconduct, or a public cheat, on the authority of *R. v. Brambridge*, 1783, 22 St. Tri. 1.

**Deportation.**—1. The nearest equivalent to this term in English law is TRANSPORTATION (*q.v.*), though in early works abjuration of the realm is regarded as the then equivalent to the Roman punishment.

2. Apart from the statutes regulating transportation and penal servitude, there is no statutory warrant for deporting or removing either a subject or an alien from the United Kingdom, although it is said that an alien has no right enforceable by action to enter British territory (*Musgrove v. Chung Teeong Toy*, [1891] App. Cas. 272). In India, under the East India Company's Act, power was given to deport without trial (§3 Geo. III. c. 52, ss. 45, 46).

3. In places subject to the Foreign Jurisdiction Acts there is given by some Orders in Council under these Acts power to deport, *i.e.* to remove and exclude from a particular territory British subjects whose absence from the territory is from one cause or another desirable (Hall, *Foreign Jurisdiction of the Crown*, 174–180). Such deportation is usually (1) for purposes of trial in a British possession or punishment in a British possession which consents to receive the offender (see COLONIAL PRISONER); and (2) of an administrative character enabling the British officials to remove British subjects whose presence menaces the peace or order of the foreign territory. In this form the power is exercised in substitution for the power of expulsion, which would ordinarily be exercisable as an incident of territorial sovereignty by the power within whose dominions the British jurisdiction is exercised. The Orders in Council conferring those powers issued prior to 1890 are collected in vol. iii. of the Statutory Rules and Orders, Revised, and those subsequently made are printed as issued in the annual volumes of Statutory Rules and Orders. The international and municipal validity of the deportation provisions, other than those relating to deportation for trial or execution of sentence, has been questioned (Piggott, *Exterritoriality*, p. 101).

4. In British India a power to deport without trial appears still to exist (see 33 Geo. III. c. 52, ss. 45, 46 *v. sup.*).

**Deposit.**—1. *With a Banker ; Deposit Note.*—Money lodged with a banker, but kept separate from a customer's current account, and generally made by arrangement withdrawable only on notice, is commonly described as "money on deposit," or as a deposit account, and the receipt given for it by the banker is called a "deposit note." The payments are not entered in the depositor's pass-book, if he is a customer. The depositor's right against the banker is merely that of a creditor (see *Hopkins v. Abbot and Bilborough v. Holmes*, cited below). So that the Statute of Limitations runs in favour of the banker (*Pott v. Cleg*, 1847, 16 Mee. & W. 321, a case of current account) :

it has nevertheless been held to be transferable by delivery of the deposit note (*Woodham v. Anglo-Australian, etc., Insurance Co.*, 1861, 3 Gif. 238), and such delivery is, it is well settled, sufficient to support a *donatio mortis causa* (*In re Dillon*, 1890, 44 Ch. D. 77), even though there be a cheque form (to "self or order") intended for use in drawing or transferring the deposit indorsed on the back of the note and filled up by the donor. A gift of "securities for moneys" in a will has been held not to pass money referred to in a deposit note (*Hopkins v. Abbot*, 1875, L. R. 19 Eq. 222); but in that case the money was payable on demand as if part of the current account.

The note requires no stamp (Stamp Act, 1891, Sch. "receipt," but *quære*, if it contains an agreement to pay interest, (Grant on *Banking*, 5th ed., p. 123, the doubt appears to be unwarranted). Forgery of a deposit note is a statutory felony (24 & 25 Vict. c. 98, s. 23).

If the banker's firm changes, *e.g.* by the retirement or death of a partner, the mere receipt of interest, or taking a fresh deposit note for part of the amount on withdrawing the remainder, is not sufficient to constitute a novation of the debt, and thereby to release the late partner or his estate (*In re Head*, [1893] 3 Ch. 426); but a fresh agreement with the continuing partners (*In re Head*, No. 2, [1894] 2 Ch. 236), or with them and new partners (*Bilborough v. Holmes*, 1876, 5 Ch. D. 255), will effect such release.

Bills deposited with a banker for collection or other special purpose do not become his property so as to go to the trustee on his bankruptcy (*Sadler v. Belcher*, 1843, 2 Moo. & R. 489; *Trelfall v. Giles*, *ibid.* at p. 493; *Jombart v. Woollett*, 1837, 2 Myl. & Cr. 389); nor do undue bills paid to him, unless they are treated as cash and carried to the customer's account, as such, with his consent (*Ex parte Sargeant*, 1810, 1 Rose, 153). If the bills are not so treated, but are merely noted as bills received on the account, they are said to be "marked short" (Grant, p. 135; see *Ex parte Sargeant*, *supra*; *Giles v. Perkins*, 1807, 9 East, 12; *Thompson v. Giles*, 1824, 2 Barn. & Cress. 422; and *Ex parte Barkworth*, 1858, 2 De. G. & J. 194).

As to deposits of valuables with a banker, see *ante*, vol. i. p. 481, and BAILMENTS.

2. *In Court*.—The Court sometimes orders documents (*Leslie v. Cave*, 1886, W. N. 162), or deeds, or other valuables (*Velati v. Braham*, 1877, 46 L. J. C. P. 415; *Redpath v. Zachner*, 1893, 9 T. L. R. 538) to be deposited in its custody for security. In the case of title-deeds relating to an estate of which the title is in question, or of which the ownership is divided (*e.g.* between tenants-in-common or life-tenant and remainderman), such orders have been made from very early times (see Cary, *Reports*, at p. 21: *Beckford v. Wildman*, 1810, 16 Ves. 438), but such order is only made where it would be dangerous to the property to leave it in the power of the person legally entitled thereto (*l.c.*; see further, *DETINUE*). Order 61, r. 30, provides that deeds and documents ordered to be brought into Court shall be deposited at the Central Office, and (by an addition made in 1895) that "no effects of suitors consisting of jewels or plate, or other articles of a like nature, or negotiable securities are to be so deposited." It would seem, therefore, that as regards such jewels, etc., the order made should be for the deposit of a box containing them in the Bank of England, or in other safe custody (see Seton on *Judgments*, 5th ed., pp. 177, 184).

In actions for the administration of trusts, or the estate of a deceased person, and similar proceedings, orders for the deposit of funds, securities, and valuables are frequently made. See Seton on *Judgments*, 5th ed., p. 1261.

3. *Mortgage*, see MORTGAGE (by deposit).

4. *On Sale*, see VENDOR AND PURCHASER.

5. *Savings Bank*, see SAVINGS BANK.

6. *Will*.—Under the Court of Probate Act, 1857 (s. 91), a person may deposit his will in the depositary of the Court for safe custody.

As to the deposit of a lunatic's will in the Master's office, see Lunacy Rules, 1892 (45–47). See further CONTROL AND CUSTODY OF COURT.

**Deposition of Sovereign.**—See ABDICATION.

**Depositions.**—As to depositions in civil cases, see COMMISSION, EVIDENCE ON; and EVIDENCE. A deposition in a criminal case is the statement upon oath of any witness, called before justices to testify on behalf of the prosecution or the defence with respect to a charge of an indictable offence, which is reduced into writing by the justices or clerk of Court, and then read over to, and signed by, the witness in the presence of the accused. See further as to this subject, INDICTMENT. As to depositions before coroners, see vol. iii. p. 426. As to copies of depositions, see EVIDENCE and INDICTMENT.

**Depreciation.**—In the law of rating a deduction is allowed in respect of the depreciation in value of property. For example, in the rating of railways, tramways, etc., a sum is deducted from the gross receipts in respect (*inter alia*) of depreciation of rolling stock; the amount of the allowance and the manner of assessment are questions of fact in each case.

**Deprivation.**—See DISCIPLINE, ECCLESIASTICAL.

**Deputy Clerk of the Peace.**—Subject to the rights of clerks of the peace holding office at the date of the passing of the Local Government Act, 1888, the power of appointing a deputy clerk of the peace is by sec. 83, subsec. 4, of that statute vested in the joint committee of the County Council and Quarter Sessions.

By sec. 164 of the Municipal Corporations Act, 1882, the clerk of the peace of a Quarter Sessions borough is empowered to appoint a fit person to act as his deputy in case of his illness, incapacity, or absence; such an appointment must be notified to the council, and recorded in their minutes. Where the clerk is unable to make the appointment, the council of the borough may do so, under the Recorders, Magistrates, and Clerks of the Peace Act, 1888 (s. 1).

**Deputy Judge.**—See COUNTY COURTS. A deputy judge, except of the Westminster County Court, is debarred from practice in any Court within the district for which he sits (County Courts Act, 1888, s. 20).

**Deputy Lieutenant.**—An officer appointed by the lieutenant of a county by commission. The appointment and qualifications of these officers are now regulated by the Militia Act, 1882. By sec. 30 of that statute the lieutenant of each county is required from time to time to appoint such

properly qualified persons as he thinks fit, living within the county, to be deputy lieutenants. At least twenty must be appointed for each county if there are so many qualified; if less than that number are qualified, then all who have the necessary qualification are to be appointed. The appointments are subject to Her Majesty's approval; Her Majesty may also require the removal of all or any of the deputy lieutenants from a county, and the appointment of others in their place. Returns of all appointments to, and removals from, the office have to be laid before Parliament annually. The commission of a deputy lieutenant is not vacated by the lieutenant who granted it ceasing to be lieutenant.

To qualify a person for the appointment, he must (a) either be a peer of the realm, or the heir-apparent of such a peer, having a place of residence within the county; or (b) have in possession an estate in land in the United Kingdom of the yearly value of not less than £200, or be the heir-apparent of such a person; or (c) have a clear yearly income from personalty within the United Kingdom of not less than £200 (s. 33). A person who acts in the office without being duly qualified is liable to a penalty of £200 (s. 35).

In the absence from the United Kingdom of the lieutenant, or during his inability to act by reason of illness or other cause, Her Majesty may authorise any three deputy lieutenants to act as lieutenant, (s. 31); and the lieutenant may, with Her Majesty's approval, appoint any deputy lieutenant to act as vice-lieutenant during his absence from the county, or during his illness or inability to act (s. 32). Otherwise the duties of a deputy lieutenant are merely nominal; he may attest militia recruits and administer the oath of allegiance to them (ss. 9, 13). See **LIEUTENANT OF COUNTY**.

**Deputy Recorder.**—Under sec. 166 of the Municipal Corporations Act, 1882, a recorder is empowered, in case of his illness or unavoidable absence, to appoint a barrister of five years' standing to act as his deputy at the Quarter Sessions then next ensuing or then being held, and it is provided that the sessions are not to be illegal or the acts of the deputy invalid by reason of the recorder's absence not being unavoidable. A like power of appointing a deputy is given to recorders who are judges of borough civil Courts (s. 175). If the recorder is unable to appoint a deputy, the authority having power to appoint the recorder may exercise this power on his behalf, and may out of his salary assign a suitable remuneration to the deputy (Recorders, Magistrates, and Clerks of the Peace Act, 1888, s. 1). A deputy recorder has all the powers of the recorder for whom he is appointed (*ibid.*).

**Deputy Registrar.**—By sec. 31 of the County Courts Act, 1888, the registrar of any County Court, with the approval of the judge, or in case of the registrar's inability, the judge, may appoint a deputy registrar to act during the illness or unavoidable absence of the registrar. The person so appointed must be qualified to be appointed registrar, that is, he must be a solicitor of the Supreme Court of at least five years' standing.

**Deputy Returning Officer.**—*Parliamentary Elections.*—Where a sheriff is returning officer for more than one division of a county

he may, by writing under his hand, appoint a fit person to be deputy returning officer for all or any of the purposes relating to an election in such division (Ballot Act, 1872, s. 8; Redistribution of Seats Act, 1885, s. 9). The returning officer for a parliamentary borough divided into electoral divisions may similarly appoint a deputy (Redistribution of Seats Act, 1885, s. 13).

*County Council Elections.*—The person appointed by a County Council to act as returning officer for the election of county councillors has the like power to appoint a deputy returning officer (Local Government Act, 1888, s. 75, subs. 3).

The duties and powers of a deputy returning officer are practically the same as those of the returning officer (see RETURNING OFFICER).

**Deputy Sheriff.**—Sec. 24 of the Sheriffs Act, 1887, requires every sheriff to appoint a sufficient deputy, who shall be resident or have an office within one mile from the Inner Temple Hall, for the receipt of writs, the granting of warrants thereon, etc.

The sheriff may appoint a deputy to take an inquisition (Mather, *Sheriff Law*, 410).

**Deputy Steward.**—The steward of a manor may appoint a deputy to act for him, subject, it seems, to the approval of the lord of the manor. Unless by special custom or special limitation of his powers, the deputy steward has practically the same jurisdiction as the steward. In the Copyhold Act, 1894, the expression "steward" includes "deputy steward" (s. 94). [See Scriven, *Copyholds*, 7th ed., 432.] See STEWARD.

**Deraign; Deregn** (*Deraisonner, derivationare*)—A mediæval term of the common law used as correlative to arraign (*adrationare*) when the person accused or arraigned offered to meet and refute the charge or claim preferred against him. It is substantially equivalent to "defend" or "contest," but is occasionally used of proof by the appellant or prosecutor of his case, and also to describe the particular mode of determining the dispute, e.g. by judicial combat (see Murray, *Dict. Eng. Law*, s.v. "Deraign").

**Derelict.**—Derelict is a term legally applied to a thing abandoned and deserted at sea by those who were in charge of it, without hope on their part of recovering it (*sine spe recuperandi*), and without intention of returning to it (*sine animo revertendi*) (Kennedy, *Civil Salvage*, 53, quoting *Cossman v. West*, 1887, 13 App. Cas. 180, Sir B. Peacock; *The Aquila*, 1798, 1 Rob. C. 37, Lord Stowell; *The Zeta*, 1875, L. R. 4 Ad. & Ec. 460, Sir R. Phillimore). It may be a ship or a part of her, e.g. a ship's boiler (*Boiler re Elephant*, 1891, 64 L. T. 543), or her cargo; but cargo which floats out of a vessel on her breaking up does not thereby become derelict, even though the master is not on board, unless it is carried by the elements beyond the reach or control of the master or other agent of the shipowner (*The Samuel*, 1851, 15 Jur. 407–410, Dr. Lushington).

"The meaning of hope of recovery (*spe recuperandi*) is the hope and expectation entertained by the master and crew of returning to their vessel. This is determined by not what was the precise state of things, but what



was the intention by which they were actuated at the time" (of leaving her) (Dr. Lushington, *The Sarah Bell*, 1845, 4 N. C. 146). That intention must be inferred from the circumstances attending the abandonment of the ship, e.g. where a ship's crew abandons her immediately after or at the time of a collision with another ship, that is no evidence of an intention to abandon her finally (*The Fenix*, 1855, Swa. 13); while if they do so three days after a collision that will be strong evidence of such an intention (*The Pickwick*, 1852, 16 Jur. 670). A vessel found at sea in a dangerous situation, and deserted, is *prima facie* a derelict (*The Cosmopolitan*, 1848 (Irish), 6 N. C. xviii.); but there is no such presumption in the case of a barge found adrift in the Thames and deserted; for the reasonable inference may be that she has merely parted from her moorings (*The Zeta*, ante). A ship is not derelict which is left by its master and crew temporarily, in order to get assistance, or with the distinct intention and purpose of returning to her, or even though the entire management of her has been given up to salvors (*The Champion*, 1863, B. & L. 69, 71; *Cossmann v. West*, ante; *The Lepanto*, [1892] Prob. 122); nor if she has been captured by enemies and subsequently deserted by them (*The John and Jane*, 1802, 4 Rob. C. 216). But an abandoned ship may be derelict if the crew quit her in order to save their lives, and not in order to get assistance, although they mean to send a steamer to look after her (*The Coromandel*, 1857, Swa. 205), and if they finally determine to leave her and do so, a subsequent change of mind and endeavour to regain her do not affect the nature of the abandonment (*The Sarah Bell*, ante).

When it is said that in order to constitute derelict there shall be an abandonment *sine spe recuperandi*, it is understood that there is some reasonable foundation for the *spe*; for a ship may, for purposes of salvage, be derelict, though an expectation of recovering her may exist (*The Genesee*, 1848, 12 Jur. 401, Dr. Lushington); and the same qualification applies to the rule of *sine animo revertendi*, for a ship which has been abandoned *sine animo revertendi* may yet not be derelict, e.g. if she sinks on a sand and is abandoned by her crew, for even though "actual possession cannot be retained (or recovered), its local situation is well known, and she must remain immoveable till human skill is applied to its recovery" (*The Barefoot*, 1850, 14 Jur. 841, *ibid.*). Though a ship is not precisely a derelict, she may be treated as such for salvage purposes (*The Elliotta*, 1815, 2 Dod. 75).

Derelicts found at sea and brought into a British port are droits of Admiralty if not claimed by their owners within a year and a day (per Sir Leoline Jenkins, quoted by Lord Stowell in *The Aquila*, above, and see ADMIRALTY, THE; and consult *R. v. Forty-nine Casks of Brandy*, 1836, 3 Hag. Adm. 270; *The Thetis*, *ibid.* 235; *R. v. Property Derelict*, 1825, 1 Hag. Adm. 383; *The Dantzic Packet*, 1837, 3 *ibid.* 385).

Derelicts found or taken possession of on or near the coasts of the United Kingdom, or any tidal water within the limits of the United Kingdom, are "wreck" within the scope of the Merchant Shipping Act, 1894, and are subject to the provisions of that Act relating to wreck (ss. 510, 518-571). See WRECK.

It is a statutory duty of every master or person in command of a British ship who becomes aware of the existence on the high seas of any floating derelict vessel to notify the same to the Lloyd's agent at his next port of call or arrival, and furnish all such information as he may possess as to the supposed locality or identity of any such derelict, and the date when, and the place where, the same may have been observed or reported to him, and

the agent must forthwith transmit the same to the secretary of Lloyd's in London; if there is no Lloyd's agent at the next place of call or arrival, the master must report to Lloyd's himself. Any such information is to be published by Lloyd's in the same way as shipping casualties, and communicated by them to the Board of Trade (1896, 59 & 60 Vict. 12).

Salvage is payable to persons bringing derelicts into safety, whether their owners appear to claim them or not; and is given on a more liberal scale than in ordinary cases of salvage. As to the reasons for this, see per Jeune, P., *The Janet Court*, [1897] Prob. 59; and so *The Champion*, ante, and *The Gertrude*, 1861, 30 L. J. Ad. 130). "Salvors of derelicts who first take possession of them, have the additional privilege of having not only a maritime lien on the ship for their services, but also the entire and absolute possession and control of the vessel" (Sir B. Peacock, *Cossman v. West*, 1887, 13 App. Cas. 181); but it is not the duty of salvors of a derelict to keep possession of her under all circumstances, and they may forfeit their claim to salvage by doing so improperly (*The Lady Worsley*, 1855, 2 Spinks 253, 255, Dr. Lushington).

The old rule of the Admiralty Court with regard to the amount of reward for salving a derelict was, at least in practice, to give one-half of the value of the salvaged property in all cases (*The Esperance*, 1811, 1 Dod. 46; *The Blendenhall*, 1814, *ibid.* 414); and this was stated to be the rule even so late as 1843 (*The Watt*, 1843, 2 Rob. W. 71); but the rule was treated as obsolete certainly in the time of Sir J. Nicholl (*The Effort*, 1834, 3 Hag. Adm. 165); and the proper rule is "to give a fit and proper amount, with reference to all the circumstances, including the value of the property salvaged and the risk to the salvors' property, and the fact of the property being derelict is an ingredient in the degree of danger in which the salvaged property was situated" (Dr. Lushington, *The True Blue*, 1866, L. R. 1 P. C. 250).

It is a safe general rule, that in no case in which the owner of salvaged property appears will the Court award the salvor more than one-half (Kennedy, 115), or, it has been said, less than one-third (see per Sir J. Nicholl, *The Effort*, above; *The Ewell Grove*, 1835, 3 Hag. Adm. 209 and 221; *ibid.* *The Britannia*, 1834, 3 Hag. Adm. 154; and per Brett, L.J., *The City of Chester*, 1884, 9 P. D. 182). Instances of half the value being awarded are to be found in *The Esperance*, above; *The Francis Mary* (1827, 2 Hag. Adm. 89, where it is stated that no precedent could be found for giving more than half); *The Hebe* (1879, 4 P. D. 217); *The Craig* (1880, 5 P. D. 186); *The Livietta* (1883, 5 Asp. 132). Less than one-third has been given in *The Ewell Grove*, ante; and *The Amerique* (1874, L. R. 6 P. C. 468, £18,000 out of £190,000); and more than one-half has been given in exceptional cases, where the value of the property was small and the owner did not appear (*The Jonge Bastiaan*, 1804, 5 Rob. C. 324; *The Jubilee*, 1826, 3 Hag. Adm. 43 a; *The Rasche*, 1873, L. R. 4 Ad. & Ec. 127). In *Boiler ex Elephant* (1891, 64 L. T. 543), a derelict boiler of a lost ship was brought in from the Channel, and, no owners appearing, was sold for £58, and the salvors were awarded £50 and their costs; and in *The Anne Helena* (1883, 5 Asp. 142), the salvaged property being worth £600, the salvors were awarded half, and an award of £150 for life salvage was also made; while in *The Reliance* (1811, 2 Hag. Adm. 90), the salvors were given half the value, and their costs out of the other half.

Where a derelict ship is salvaged, her freight does not form part of the fund available to the salvors, for the cargo owners are released from the

contract of affreightment by the abandonment (*The Cito*, 1881, 7 P. D. 5; *The Argonaut*, 1884, Kennedy, 195).

[*Authorities*.—Kennedy, *Civil Salvage*; Maclachlan, *Shipping*.]

**Derelict Lands.**—Blackstone (2 *Com.* p. 261) says of these: "As to lands gained from the sea by *alluvion* (*q.v.*), by the working up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. But if the alluvion or dereliction be sudden and considerable, it belongs to the king" (Hale, *De jure maris*, p. 14; Callis on *Sewers*, p. 51; *R. v. Lord Yarborough*, 1824, 3 Barn. & Cress. 91; *Scrutton v. Brown*, 1825, 4 Barn. & Cress. 485; cp. *Hindson v. Ashby*, [1896] 2 Ch. 1). But the grant of a manor by the Crown *cum littore maris*, would pass its right to these accretions (Hale, pp. 12, 17).

The owner of lands which are allowed to lie as derelict is liable under the Public Health Acts for nuisances occasioned upon them (*A.-G. v. Tod-Heatley*, [1897] 1 Ch. 560).

**Dereliction.**—See ALLUVION and DERELICT LANDS.

**Derivative Conveyances.**—Blackstone (2 *Com.* 324) divides conveyances into two kinds—primary or original, and secondary or derivative. The latter "presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance." Among derivative conveyances he instances releases, confirmations, surrenders, assignments, and defeasances.

**Derivative Settlement.**—By sec. 35 of the Divided Parishes and Poor Law Amendment Act, 1876, derivative settlements are abolished, except in the case of a wife from her husband, and in the case of a child under sixteen, which takes the settlement of its father or of its widowed mother, as the case may be, up to that age, and retains the same until it acquires another. The section further provides that an illegitimate child shall retain the settlement of its mother until it acquires another settlement; and also that if any child mentioned in the section shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in his or her birth parish. This section, which has given rise to much litigation, is very fully discussed in the judgment of Lord Watson in *Reigate Guardians v. Croydon Union*, 1889, 14 App. Cas. 465, to which reference should be made. See POOR LAW, *Settlement*.

**Derogation.**—That "a man shall not derogate from his own grant," is a rule of the common law of frequent application (Brown, *Legal Maxims*, 6th ed., p. 166). "A grantor cannot defeat his own grant; and therefore, if a man grant twenty of his best trees to be taken in ten years, the

grantor cannot cut down trees without consent of the grantee" (*Com. Dig. "Grant" (F)*). Hence no reservation in favour of the grantor affecting the estate granted can be implied, except an easement of necessity (*Crossley v. Lightowler*, 1867, L. R. 2 Ch. 478; *Whiteldon v. Burrows*, 1879, 12 Ch. D. 31; *Taves v. Knowles*, [1891] 2 Q. B. 564; see especially the judgment of Thesiger, L.J., in 12 Ch. D. at p. 48). The recent case of *Trego v. Hunt*, [1896] App. Cas. 7, where it was held that the vendor of the goodwill of a business cannot canvass the old customers, is another illustration of the rule.

### **Descent.**—See INHERITANCE.

**Descent Cast.**—Under the old law where a disseisor died seised of lands, and the lands descended to his heir, such heir was considered as clothed with an apparent right of possession, the effect of which was that he could not be expelled by mere entry on the part of the person ousted, unless the latter had made a conditional claim to the lands. The doctrine of descent cast did not apply if the claimant was under disabilities; it was also limited to some extent by 32 Hen. VIII. c. 33; and, finally, by sec. 39 of the Real Property Limitation Act, 1833, it was provided that "no descent cast, discontinuance, or warranty which may happen or be made, shall toll or defeat any right of entry or action for the recovery of land" (see Shelford, *Real Property Statutes*, 9th ed., p. 172).

**Deserted Premises.**—When a tenant has deserted the premises which have been demised to him, and there is little or no prospect of the landlord's obtaining payment of his rent, a special machinery has been provided by statute for enabling him expeditiously to regain possession of his property. The following conditions must be fulfilled:—The premises must have been let at a rack-rent, or at a rent not less than full three-fourths of their annual value; there must be an arrear of one half-year's rent; and the premises must have been deserted and left "uncultivated or unoccupied," so as no sufficient distress can be had to countervail the arrears of rent. But the demise or agreement under which the premises were let may have been either written or verbal, and it is not necessary that any right of re-entry has been reserved to the landlord in the event of non-payment of the rent. The enactment in question (11 Geo. II. c. 19, s. 16, as modified by 57 Geo. III. c. 52) provides that where the above conditions are found to exist, two justices of the district where the premises are situated may, at the request of the landlord, go and view them; that they may post up a written notice stating what day (not being less than fourteen clear days off) they will return for a second view; and that if when that happens the tenant fails to appear and pay the arrears, or there should be no sufficient distress, they may put the landlord into possession of the premises.

In accordance with established rule these powers, vested in two justices, may be exercised by a stipendiary magistrate (21 & 22 Vict. c. 73, s. 1); but in the case of the metropolis the procedure is slightly different. For the statute 3 & 4 Vict. c. 84 directs (s. 13) that within the metropolitan district a police magistrate, instead of going himself to the premises, may, upon proof being furnished to him of the arrear and desertion, issue his

warrant to a constable to view the premises and affix the notice referred to; and upon the return of the warrant and satisfactory proof of its execution, and of failure on the part of the tenant to pay the rent in arrear, and of the absence of sufficient distress, he may issue his warrant to put the landlord into possession.

The question whether the premises have been "deserted" within the meaning of the Act is one which the justices upon their first view of them are required to decide. The application of the statute will not be prevented by a retention of possession which is merely colourable (per Lord Ellenborough, C.J., in *Ex parte Pilton*, 1818, 1 Barn. & Ald. 369; 19 R. R. 342. Compare with this case *Ashcroft v. Bourne*, 1832, 3 Barn. & Adol. 684). And it has been held that the recovery by the landlord of an unsatisfied judgment for half a year's rent will not disentitle him to proceed under the statute (*In re Emmett*, 1850, 14 J. P. 530).

If the tenant is dissatisfied with the decision of the justices, he has the right of appealing to the judge at the next assizes for the county where the premises are situated, or to the judges of the Q. B. D. if they are situated in the city of London or the county of Middlesex (11 Geo. II. c. 19, s. 17); and such judge or judges are empowered to make an order of restitution to him if they should see fit, an order which should be directed to the justices who have deprived him of possession (*R. v. Traill*, 1840, 12 Ad. & E. 761). But so long as the latter have acted within their jurisdiction—a matter which depends on whether the facts stated in the landlord's request for their intervention are sufficient under the statute—no action of trespass will lie against them; nor will an action lie against the landlord to whom possession may have been delivered by the justices, unless he has made a statement in such request false in some material particular (*Basten v. Carew*, 1825, 3 Barn. & Cress. 649).

**Desertion (Military, Naval).**—The offence of desertion, or attempting to desert, Her Majesty's service implies an intention on the part of the offender, either not to return to the service at all or to escape some particular important service. Absence without leave differs from desertion, in this intention not existing. Disguises and other circumstances are matters of evidence as to this fact. By sec. 12, Army Act, 1881 (44 & 45 Vict. c. 59), "Every person subject to military law, who commits any of the following offences:—(a) deserts or attempts to desert Her Majesty's service; (b) persuades, endeavours to persuade, procures, or attempts to procure, any person subject to military law to desert from Her Majesty's service shall, on conviction by court-martial—if he committed such offence when on active service, or under orders for active service, be liable to suffer death, or such less punishment as in the Act mentioned; and if he committed such offence under any other circumstances be liable, for the first offence, to suffer imprisonment, or such less punishment as in the Act mentioned; and for the second or any subsequent offence, to suffer penal servitude, or such less punishment as in the Act mentioned." A previous offence of fraudulent enlistment may be reckoned as a previous offence for the purpose of a higher punishment. The scale of punishment is contained in sec. 44. By sec. 153, any person who in the United Kingdom or elsewhere, by any means whatsoever, (1) procures or persuades any soldier to desert, or attempts to procure or persuade any soldier to desert, or (2) knowing he is about to desert aids, or assists him; or (3) knowing a soldier to be a deserter, conceals him, or aids him in concealing himself, or

aids or assists in his rescue, is liable, on summary conviction, to be imprisoned with or without hard labour for not more than six months. Sec. 154 provides for the arrest by a constable or, if no constable can be met with, by any officer, soldier, or other person, of a suspected deserter, and forthwith bringing him before a Court of summary jurisdiction; the issue of a warrant for the deserter's arrest; and, on the Court being satisfied of the offence having been committed, for the offender being delivered over into military custody, or his detention in prison until he can be delivered into such custody. In either case the Court must send a Secretary of State a descriptive return of the deserter. The form of this return is given in Sched. 4 of the Act; and the justice may insert therein the name of any person whom he recommends for a reward, varying from five to twenty shillings, in regard to the arrest.

A deserter is not to be tried, unless he was on active service, if he has served in an exemplary manner for not less than three years in any corps of regular forces; but this does not affect his liability to a Civil Court if his offence is a civil crime (s. 161). On conviction or confession, the deserter is liable to general service, or transfer to such corps of regular forces as the competent military authority may from time to time order (s. 83 (17))—but the Royal Marines are excepted from this provision by subs. (12). He also forfeits the whole of his prior service (s. 73 (1), (3); s. 79 (2)), and his pay for the period of desertion and imprisonment (s. 138 (1)); unless remitted by the Secretary of State, subject to the provisions of any Royal Warrant (s. 139). Men on furlough, a soldier detained by sickness, or other casualty, may be granted an extension, for not more than a month, by a justice of the peace, if there is no officer on duty within a convenient distance; and on the justice certifying to the commanding officer, or Secretary of State, the soldier is not to be treated as a deserter, or as absent without leave (s. 173). By sec. 27 (3), every person subject to military law who, being a soldier, falsely states to his commanding officer that he has been guilty of desertion, or of fraudulent enlistment, or of desertion from the navy, or has served in, and been discharged from, any portion of the regular forces, reserve forces, or auxiliary forces, or the navy, shall, on conviction by court-martial, be liable to suffer imprisonment, or such less punishment as mentioned in the Act. And any person who pretends to be a deserter is liable, on summary conviction, to be imprisoned, with or without hard labour, for a period not exceeding three months (s. 152). With regard to the disposal of the effects of a deserter, see *Regimental Debts Act, 1893* (56 & 57 Vict. c. 5, s. 23); the *Rules of Royal Warrant, August 30, 1893*, secs. 35–48.

Upon a charge of desertion there may be a conviction for an attempt or of being absent without leave; and on a charge of an attempt, a conviction for desertion, or absence without leave (s. 56 (3), (4)). A person subject to military law assisting another to desert, or being cognisant of any desertion, or intended desertion, who does not forthwith give notice to his commanding officer, or take any steps in his power to obtain the apprehension of the deserter is liable to imprisonment, or such less punishment as is mentioned in the Act (s. 14).

Corresponding provisions relating to desertion from the navy (so far as they are applicable) are contained in the *Naval Discipline Act, 1866* (29 & 30 Vict. c. 108, ss. 19–26), and in the *Naval Deserters Act, 1847* (10 & 11 Vict. c. 62).

By sec. 16 of the *Reserve Forces Act, 1882* (45 & 46 Vict. c. 48), sec. 154 of the *Army Act, 1881*, is applied to a man who is a deserter, or

absentee without leave, from the army, militia, or reserve, in like manner as it applies to a deserter in that section mentioned; and see secs. 15, 17, for other similar provisions. See also articles, ARMY; COURTS-MARTIAL; ENLISTMENT; RESERVE FORCES; MILITIA; VOLUNTEERS; YEOMANRY; MERCANTILE MARINE.

[Authorities.—*Manual of Military Law* (War Office), 1894; Thring's *Criminal Law of the Navy*, 2nd ed.]

**Desertion of Wife and Children.**—1. A husband is not at common law under any obligation, directly enforceable by legal proceedings, either to cohabit with or to maintain his wife. If they live apart by consent, he is, however, as a general rule, liable on contracts made by her to obtain necessaries for herself or his children if properly and legally under her care, unless he himself sufficiently supplies her with them or the means of obtaining them, or with an agreed income payable and paid under an agreement between them (*Bazeley v. Forder*, 1868, L. R. 3 Q. B. 559; *Eastland v. Burchell*, 1877, 3 Q. B. D. 432; *Wilson v. Glossop*, 1888, 20 Q. B. D. 357). And this liability exists even where he has given notice not to give the wife credit, subject merely to the consequent rule that in such a case the person suing on the contract must prove that the wife's position gave her implied authority to pledge the husband's credit. The liability ceases if the wife is guilty of adultery (*Colley v. Charman*, 1881, 7 Q. B. D. 89).

Where the husband deserts his wife, or wrongfully compels her to leave his home, and does not sufficiently maintain her, in cash or kind, the rule applies; but it does not apply where she leaves him without his consent or without some sufficient cause, such as duress or ill-treatment (*Biffin v. Bignell*, 1862, 7 H. & N. 877; *Eastland v. Burchell*, 1878, 3 Q. B. D. 432).

2. Besides the common law remedies against the husband possessed by persons who have contracted with the wife, she had, under the ecclesiastical law, a right to sue for RESTITUTION OF CONJUGAL RIGHTS when deserted by the husband, i.e. where he wilfully absented himself from her society and from cohabitation against her wish. This remedy is now under the Matrimonial Causes Act (20 & 21 Vict. c. 85, s. 6) given by the High Court. If the desertion has continued for two years or more without reasonable cause, she can obtain a decree of JUDICIAL SEPARATION, coupled with an order for ALIMONY (20 & 21 Vict. c. 85, s. 16), or she can sue for restitution of conjugal rights. Non-compliance with an order for restitution is equivalent to desertion without reasonable cause, and the wife without waiting till it has lasted for two years can obtain a judicial separation (47 & 48 Vict. c. 68, s. 5). The wife's adultery is, of course, a bar to her enforcing any of these remedies.

Without applying to the High Court a deserted wife can, under 20 & 21 Vict. c. 85, s. 21; 27 & 28 Vict. c. 44, obtain from the justices of her place of residence (*R. v. Plymouth J.J.*, 1881, 44 J. P. 168) a protection order as to her earnings and property which makes them hers, as if she were a *feme sole*, and frees them from claims by the husband or his creditors. These orders are unnecessary as to women married since 1882 (45 & 46 Vict. c. 75).

3. Various enactments have from time to time been passed to give a more summary remedy to a deserted wife than those under the Matrimonial Causes Acts. These have now been all repealed and superseded by the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39). Parts of the Act give remedies for violence to the wife not here material. But it empowers a Court of summary jurisdiction for a district in which

the cause of complaint has wholly or partially arisen, including, in the case of desertion, the wife's residence (*Chudleigh v. Chudleigh*, 1892, 62 L. J. M. C. 97), to intervene on the application of a wife who (1) has been deserted by her husband, or (2) has been caused to live separately and apart from him by his persistent cruelty to her, or his wilful neglect to provide reasonable maintenance for her and her infant children, whom he is reasonably bound to maintain (58 & 59 Vict. c. 39, s. 4). The proceedings in the complaint are to be in accordance with the Summary Jurisdiction Acts. Desertion is, but cruelty and neglect to maintain are not, regarded as continuing acts within the limitation section (11) of the Summary Jurisdiction Act, 1848 (*Heard v. Heard*, [1896] Prob. 188; *Ellis v. Ellis*, [1896] Prob. 251; and see *Lane v. Lane*, [1896] Prob. 133).

If satisfied of the truth and justice of the wife's complaint, the Court may make an order containing all or any of the following provisions:—

(1) That the wife need no longer cohabit with her husband, which, while in force, has the same effect as a decree of judicial separation by the High Court, including that of putting her in the position of a *feme sole*; (2) that the legal custody of children of the marriage who are under sixteen be given to the wife; (3) that the husband pay for the maintenance of the wife such weekly sum, not exceeding forty shillings, as appears reasonable after consideration of the means of the spouses; and (4) that the costs of the Court and parties be paid by such parties as the Court think fit (s. 5). If the justices award no costs, no action will lie for them (*Cole v. James*, [1897] 1 Q. B. 418). Adultery by the wife, unless condoned or connived at by the husband, or condoned to by his wilful neglect or misconduct, is a bar to any remedy in favour of the wife (s. 6). An order, when made, may be altered, varied, or discharged on fresh evidence (s. 7) (including a change of the weekly rate of maintenance, subject to the forty shillings limit), and will be discharged on proof of resumption of cohabitation by the wife, or of her adultery after the order.

Arrears of maintenance are enforceable in the same way as arrears on a bastardy order (s. 9). See BASTARDY.

Appeals on law and fact go from the justices to the Probate Division of the High Court (s. 11), and not, as is usual in magistrates' cases, on fact to Quarter Sessions, and on law to the Queen's Bench Division (*Manders v. Manders*, [1897] 1 Q. B. 474). The procedure on the appeals is regulated by R. S. C., Order 59, rr. 4 a, 7, 8, 10, 11, 12, and 16 (*Swoffer v. Swoffer*, [1896] Prob. 131); but the Court, except so far as the statute otherwise requires, follows the general matrimonial law and practice as to costs and otherwise (*Earnshaw v. Earnshaw*, [1896] Prob. 160).

The meaning of the term "desertion" has been the subject of much discussion in the Courts, particularly with reference to the summary remedies. There must have been an active withdrawal by the husband without the wife's consent from an existing state of cohabitation; but this does not necessarily imply that the spouses must have been continuously living together under one roof up to the date of the desertion (*Bradshaw v. Bradshaw*, [1897] Prob. 24). It does not include refusal to comply with terms on which a separation has taken place by mutual consent (*Pape v. Pape*, 1888, 20 Q. B. D. 66); or refusal to resume cohabitation on the wife's request after separation by consent (*R. v. Lercschke*, [1891] 2 Q. B. 418); but does include refusal to resume cohabitation after a temporary separation for mutual convenience (*Chudleigh v. Chudleigh*, 1892, 62 L. J. M. C. 97).

Absence of the husband, coupled with adulterous cohabitation with another woman, is in certain cases treated as evidence of intention to



desert (*Drew v. Drew*, 1888, 13 P. D. 97; *Garcia v. Garcia*, 1888, 13 P. D. 216).

The term "persistent cruelty" is left undefined, but its definition is being worked out by reference to the meaning of the term "cruelty" in the Matrimonial Causes Acts; as to which, see *Russell v. Russell*, [1895] Prob. 315; [1897] App. Cas.

The earnings of the husband must be considered to see (1) whether he is earning, and can earn, a livelihood, so as to make his neglect to maintain wife and family wilful (*Earnshaw v. Earnshaw*, [1896] Prob. 160); (2) what should be the weekly amount of maintenance to be ordered (*Lane v. Lane*, [1896] Prob. 131).

4. The Poor Relief Act, 1601, 43 Eliz. c. 2, s. 6, first established a direct civil legal obligation for the maintenance of children, where the father is of sufficient ability (*Bazley v. Forder*, 1868, L. R. 3 Q. B. 559, 565). This was extended to the wife by secs. 56 and 57 of the Poor Law Act of 1834, 4 & 5 Will. IV. c. 76 (see CRUELTY, *To Children*; POOR LAW), but was also limited to children under sixteen not being blind, deaf, or dumb.

Relief given, or its cash price, is chargeable against the husband or father as a loan (4 & 5 Will. IV. c. 76, s. 58), and maintenance orders in satisfaction of the liability are now made under sec. 36 of the Poor Law Act, 1868, 31 & 32 Vict. c. 22; and where a wife requires relief without her husband applying, proceedings can be taken for the recovery of the amount of relief from him under sec. 33 of the same Act.

Under 5 Geo. I. c. 8, the poor law authorities are empowered, under warrant from two justices, to seize the goods of a man who leaves his wife and children on the parish, and to sell them and apply the proceeds for the maintenance of the deserted family (*Stable v. Dixon*, 1805, 6 East, 163).

And where a husband runs away and leaves his wife or legitimate children (*R. v. Maude*, 1842, 11 L. J. M. C. 120) chargeable, or with the result that they become chargeable, to any parish or union, he is liable to conviction as a rogue and a vagabond under the Vagrancy Act, 1824, and to imprisonment, with or without hard labour, for not over three months, or fine not exceeding £25 (5 Geo. IV. c. 83, s. 4; 12 & 13 Vict. c. 103, s. 3).

Proceedings may be taken by a relieving officer within two years from the date of chargeability (39 & 40 Vict. c. 61, s. 19; *Reeve v. Yates*, 1862, 31 L. J. M. C. 241), and the guardians have power to assume the control of boys up to sixteen, and girls up to eighteen, where they have been deserted by a parent (52 & 53 Vict. c. 56, s. 1).

**Deserving Objects, Gift to.**—A gift to "deserving objects" is void as being too vague, as "almost any object might be said to be a 'deserving' object" (per Pearson, J., in *In re Sutton, Stone v. A.-G.*, 1885, 28 Ch. D. 464). A gift, however, to "charitable and deserving objects" is good, the word "charitable" governing the whole sentence (*ibid.*). See CHARITIES, vol. ii. pp. 466 and 468.

**Designs.**—The Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), repealed all prior legislation as to designs, and consolidated the law. The law, as it at present obtains, is to be found in that Act as slightly amended by the Patents, etc., Acts of 1886 (49 & 50 Vict. c. 37) and 1888 (51 & 52 Vict. c. 50), and in the Designs Rules of

1890 and 1893, drawn up and published by the Board of Trade under statutory power.

*The term "Design" as used in the Patents, etc., Act.*—The word "design" is not fully defined by the Acts, and therefore is used in them in the ordinary sense, viz. a plan or outline in general. But it is not every such design which may be registered and become the subject-matter of copyright under the Acts. The Act of 1883 defines a design as "any design applicable to any article of manufacture, or to any substance, artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether of printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined, not being a design for a sculpture or other thing within the protection of the Sculpture Copyright Act of the year 1814." From this it will be seen that it is only special classes of designs which can be protected under this Act, viz. a design applicable to manufactured articles, for the pattern, shape, or ornamenting thereof (see judgment of Lindley, L.J. in *In re Clarke's Design*, [1896] 2 Ch. at p. 43, and per Lord Herschell in *Hecla Foundry Co. v. Walker*, 1889, 14 App. Cas. 550).

The design is not the article of manufacture itself; it is that which is applied to the article; a mechanical contrivance, or a process, cannot be protected as a design (*Margetson v. Wright*, 1847, 2 De G. & Sm. 420; *Walker v. Falkirk Iron Co.*, 1887, 4 R. P. C. 390). It may be that the peculiar shape of a thing may give it certain mechanical advantages: in such a case the registration of the design may carry with it a temporary and partial monopoly in the contrivance: nevertheless it is not the contrivance, it is the shape alone, which procures this protection (see *Rogers v. Driver*, 1850, 16 Q. B. 102; *R. v. Bessell*, 1851, 16 Q. B. 810).

It follows that whilst a design may produce a useful result, it is not necessary that it should do so. This is clear from a consideration of the two cases last quoted (and see *In re Clarke's Design*, [1896] 2 Ch. at p. 48; and *Cooper v. Symington*, 1893, 10 R. P. C. 264). As mechanical advantages may directly result from the shape or configuration, it will sometimes happen that an inventor may have an article which is the subject-matter of letters patent or of registration as a design. It has been contended that in such case he must have recourse to the patent laws; but the contention has been ruled to be unsound (*Walker, Hunter, & Co. v. Falkirk Iron Co.*, 1887, 4 R. P. C. 391).

A design for a portion of an article may be validly registered (S. C.); and a combination design is capable of registration (*Norton v. Nichols*, 1859, 28 L. J. Q. B. 225). But it has been said that an effect is not a design, though the combination which produces the effect may be (*Grafton v. Watson*, 1884, 50 L. T. 420; 51 L. T. 141).

*New or Original.*—Assuming that the design which it is desired to protect is one which falls within the definition clause of the Act of 1883, it cannot be validly registered unless it be new or original, and not previously published in the United Kingdom (1883, s. 47 (1)). That is to say, it must substantially differ from every design previously published in the United Kingdom.

There seems some doubt as to whether the expression is not tautologous; but if "new" and "original" are different attributes, the law does not require them to co-exist in order to render a design eligible for registration.

(see per Lindley, L.J., in *In re Clarke's Design*, [1896] 2 Ch. at p. 44, and cp. the remarks of Manisty, J., in *Sherwood v. The Decorative Art Tile Co.*, 1887, 4 R. P. C. 207, 209). In determining whether a given design is novel or not, it must be borne in mind that it is not every mere difference of cut, every change of outline, every change of length, breadth, or configuration, which constitutes novelty. A design is not novel unless it differs substantially from what has been produced before, having in view the purpose to which it is to be applied. This has been decided on many occasions, the leading case on this branch of the subject being *Le May v. Welch*, 1884, 28 Ch. D. 24 (the "tandem collar" case); see also *Smith v. Hope*, 1889, 6 R. P. C. 200; *Lazarus v. Charles*, 1873, L. R. 16 Eq. 117; *M'Crea v. Holdsworth*, 1870, L. R. 6 Ch. 418. The cases on infringement will also be found to contain dicta which support the proposition above stated; see, for a recent example, *Harper v. Wright*, [1896] 1 Ch. 142 (the "cathedral stone" case).

If the way in which it is applied be such as to make a novel design, the fact that the subject-matter itself is old will be no bar to the valid registration of the design. This seems to be contradicted by the decision in *Adams v. Clementson*, 1879, 12 Ch. D. 714; but, if so, the decision, and not the statement, is erroneous. *Saunders v. Wiel* (the *Westminster Abbey* case), [1893] 1 Q. B. 470, in the Court of Appeal, is the best authority in this connection. But a novel method of applying is not capable of registration, *per se*; there must be novelty in the pattern or shape (*Cooper v. Symington*, 1893, 10 R. P. C. 264).

If the design be old, its application to a new substance will not, *per se*, make it a novelty; its application to a new purpose may. The test has recently been stated by Lindley, L.J., in *In re Clarke's Design*, [1896] 2 Ch. at p. 45, in which it was decided that an old and well-known shade, formerly in use for gas or oil burners, did not become a novelty when applied as a shade for the electric light. In *In re Bach's Design*, 1889, 42 Ch. D. 661, a rose-shaped china lamp shade was held to have been anticipated by a rose-shaped linen lamp shade. But in *Walker v. Falkirk Iron Co.*, 1887, 4 R. P. C. 390, and in *Hecla Foundry Co. v. Walker*, 1889, 14 App. Cas. 550, a door, as applied to kitchen ranges, was allowed to be new, though doors of a similar shape had been used before for other purposes. These cases supply the best contrast obtainable (and see *In re Read and Greswell's Design*, 42 Ch. D. 260). A combination of old designs may result in a new and original design (per Lindley, L.J., in *In re Clarke's Design*, *supra*; *Harrison v. Taylor*, 1859, 4 H. & N. 815), but there must be novelty in the combination (*Norton v. Nichols*, 1859, 28 L. J. Q. B. 225; *Lazarus v. Charles*, 1873, L. R. 16 Eq. 117). Whether or not a thing is new or original is to be determined by the eye and by the eye alone (*Hecla Foundry Co. v. Walker*, *supra*; *Le May v. Welch*, *supra*; *Moody v. Tree*, 1892, 9 R. P. C. 333). But the Court will accept to a certain extent the assistance of expert witnesses (*Cooper v. Symington*, 1893, 10 R. P. C. 264, 267).

**Prior Publication.**—A design may be anticipated, by publication in one of two ways: (a) by prior user; (b) by publication; and publication may take place either by printing or drawing, writing in books and other documents, or by publication to private individuals. It is unnecessary to deal with this part of the law at any length, inasmuch as the law relative to designs and to letters patent for invention are in this respect very similar, and will be fully dealt with hereafter under the heading PATENTS. In this place it will suffice to say—

(a) As to prior user: prior user means user in public, not necessarily

user by the public (*Carpenter v. Smith*, 1841, 7 Mee. & W. 300; *Stead v. Williams*, 1843, 2 Web. P. C. 126, 136; *Lifeboat Co. v. Chambers*, 1891, 8 R. P. C. 418). User beyond the United Kingdom does not of itself affect registration (Act of 1883, s. 47 (1)).

(b) Publication in books and documents: such publication is not a bar unless it be such that the public has had the opportunity of acquiring knowledge of the design, so that it becomes part of the stock of public knowledge; whether or not the publication is sufficient to amount to anticipation and avoid the registration is to be determined on the particular facts of each case (see *Lang v. Gisborne*, 1862, 31 Beav. 133; *Plimpton v. Malcolmson*, 1876, 3 Ch. D. 531; *Plimpton v. Spiller*, 1877, 6 Ch. D. 412; *Harris v. Rothwell*, 1887, 35 Ch. D. 416; *Otto v. Steel*, 1886, 31 Ch. D. 241). Whether registration of a design be publication seems doubtful (*In re Read and Greswell's Design*, 1889, 42 Ch. D. 260).

(c) Publication to individuals: the publication is sufficient to bar registration of a design substantially the same as that published if there be a fair conclusion from the evidence that some people in the United Kingdom, under no obligation to secrecy arising from confidence or good faith towards the owner of the design, knew of it at the date when the application for registration was made (per Fry, L.J., in *Humpherson v. Syer*, 1887, 4 R. P. C. 414; see also *Blank v. Footman*, 1888, 39 Ch. D. 678).

*Publication at Exhibitions.*—The 57th section of the Act of 1883 provides that publication at an industrial or international exhibition certified as such by the Board of Trade, or the exhibition elsewhere during the period of the holding of the exhibition, shall not, subject to certain conditions as to notice and time to be observed, be treated as publication sufficient to bar registration of the exhibited design; the 3rd section of the Act of 1888 empowers the Queen by Order in Council to extend these provisions to exhibitions held out of the United Kingdom (see these sections and Designs Rules, 1890, r. 36).

The subject of prior user and publication is fully dealt with in Edmunds on *Designs*, pp. 32–49.

*Application for Registration.*—The application must be made in the prescribed form and according to certain rules, which for want of space cannot be set out at length here; and there are certain fees to be paid. For these see the Act of 1883, secs. 48 and 49, and the Designs Rules, 1892, rr. 6–19. The application may be made by any person claiming to be the proprietor, that is to say, by any of the following: (a) the author of the design; (b) a person who employed the author to execute the work for good or valuable consideration; (c) a person acquiring the design for good and valuable consideration; (d) a person acquiring the right to apply the design to the articles, either exclusively of any other person or otherwise; or (e) a person on whom the design or these rights may devolve (Act of 1883, s. 61). The application must be made at the Patent Office, and must contain a statement of the nature of the design, and whether the pattern or configuration is what is claimed by the inventor; he must state in which of the fourteen classes (into which for this purpose the Board of Trade divides goods) he desires that the design should be registered; he may register in more than one class. He must also send to the Patent Office the proper number of drawings or photographs, or other means of identifying the design.

If the comptroller grants the registration, he gives a certificate which is *prima facie* evidence of what it states (Act of 1883, ss. 49, 96); but after hearing the applicant, he may refuse registration, and from his decision

there is an appeal to the Board of Trade. Opponents are not heard; if any party is aggrieved by registration, his remedy is to apply to rectify the register (Act of 1883, s. 90).

*The Register of Designs.*—This is kept at the Patent Office, and must contain the names and addresses of the proprietors, notifications of assignments and of transmissions of title, and other matters as from time to time prescribed (Act of 1883, s. 55 (1)); but no notice of any kind, express, implied, or constructive, shall be entered on the register (*ibid.* s. 85); equitable assignments have been allowed to be entered thereon (*Stewart v. Casey*, [1892] 1 Ch. 104). If a person becomes entitled by assignment, transmission, or other operation of law to copyright in a design, the comptroller must, on request and on proof of title to his satisfaction, enter such person as proprietor (Act of 1883, s. 87). Any person "aggrieved" by any omission from, or any entry made without sufficient cause in, the register, may apply to the Court, and the Court may expunge or vary the entry if it thinks fit (*ibid.* s. 90). An "aggrieved person" may be defined as one who is in some way or other substantially interested in having the entry removed from the register, and who would be substantially damaged if the mark remained (per Bowen, L.J., in *In re Powell's Trade Mark*, [1893] 2 Ch. at p. 406; see also Edmunds on *Designs*, pp. 74 *et seq.*; and also *post*, under TRADE MARKS, PATENTS. The comptroller has power to correct clerical errors (Act of 1883, s. 91).

During the continuance of the copyright the design may not be inspected, save (1) by the proprietor, or (2) by a person authorised in writing by him, or (3) by a person authorised by the Court or by the comptroller (Act of 1883, s. 52); and a person who is refused registration of a design may inspect a previous design, the identity of which with his is the reason for the refusal (Act of 1888, s. 6). But the register of proprietors of designs is open to public inspection, at reasonable times, on payment of the prescribed fee (Act of 1883, s. 88).

*Infringement.*—When a design is registered, the registered proprietor has copyright in the design during five years from the date of registration (Act of 1883, s. 50 (1)), *i.e.* he has the exclusive right to apply the design to any article of manufacture, or to any substance in the class or classes in which the design is registered (*ibid.* s. 60). This right is protected by the 58th section of the Act of 1883 (amended by that of 1888), which prohibits any person (a) from applying or causing to be applied, without the licence or written consent of the registered proprietor, the design or "any fraudulent or obvious imitation thereof," in the class or classes of goods in which such design is registered, for purposes of sale to any article or substance; and (b) from publishing or exposing for sale any article of manufacture, or any substance to which such design or any fraudulent or obvious imitation of it shall have been applied, "*knowing that the same has been so applied without the consent of the registered proprietor.*" The words in italics differentiate the position of a mere vendor from that of the manufacturer. It is a question of fact whether the vendor had or had not such information as would amount to knowledge of infringement; he is not bound to regard mere rumours or an indistinct notice, provided he acts with *bona fides* (*Smith v. Lewis, Roberts, & Co.*, 1888, 5 R. P. C. 611). If the proprietor authorises one to sell articles to which his design applies, he will, under ordinary circumstances, be taken to have authorised sub-sales (*Thomas v. Hunt*, 1864, 17 C. B. N. S. 183). Though a design be not exactly similar to one previously registered, its application will still be an infringement of the latter, if it be an obvious or fraudulent imitation. An "obvious" imitation exists if, the two designs

being put side by side, they would strike the eye as the same, though on minute examination they might be found to be different (*Chitty, J.*, in *Grafton v. Watons*, 1884, 50 L. T. 420; see also *Barran v. Lanas*, 1880, 28 W. R. 973; *Harper v. Wright*, [1896] 1 Ch. 142). A "fraudulent" imitation has been described as an imitation varied for the purpose of perpetrating a fraud by introducing minute differences on purpose to escape from the charge of infringement (per Manisty, J., in *Sherwood v. Decorative Art Tile Co.*, 1887, 4 R. P. C. 207).

Whether or not a design has been infringed is a question of fact, to be determined by the eye: the issues of novelty and infringement are tried by almost identical tests (*Hecla Foundry Co. v. Walker*, 1889, 14 App. Cas. 550; *Harper v. Wright*, *supra*); but the state of knowledge at the date of the registration of the design must be taken into account in determining the question of infringement (*Harper v. Wright*, *supra*).

*Remedies for Infringement.*—Any person who infringes is liable for every offence to forfeit a sum not exceeding fifty pounds to the registered proprietor of the design, provided that the total sum forfeited in respect of any one design shall not exceed one hundred pounds (Act of 1883, s. 58, as amended by Act of 1888); the Court fixes the penalty, but if there are no aggravating circumstances the amount is often light (*Saunders v. Wiel*, [1893] 1 Q. B. 470). Instead of suing for a penalty, the proprietor may bring an action of damages (Act of 1883, s. 59); but he must make his election (*Saunders v. Wiel*, 1892, 9 R. P. C. 467, 470). The remedy, whether damages or penalty, is pursued in any Court of competent jurisdiction (s. 58), and the procedure is that in use for actions generally; but see *DISCOVERY*, *post*.

*Marking.*—The 51st section of the Act of 1883 provides that copyright shall cease if before delivery on sale of any article to which a registered design has been applied, the proprietor has failed to mark the article with the prescribed mark, or with the prescribed words or figures denoting that the design is registered. By the Designs Rules the prescribed marks are "Rd." or "Regd." (depending on the class of goods), and in addition there must be placed on any article, other than lace, the number appearing on the certificate of registration. The proprietor who shows that he took all proper steps to insure the marking of the article does not lose his copyright (Act of 1883, s. 51). But mere desire and intention to mark will not suffice to save him (*Wooley v. Broad*, 1892, 9 R. P. C. 429); nor can he protect himself by giving general instructions that the goods shall be marked; he must take reasonable means to see that his instructions are carried out (*Johnson v. Bailey*, 1893, 11 R. P. C. 21). The removal of marks by the purchaser or any other non-proprietor will not be fatal to the copyright (*Heywood v. Potter*, 1853, 1 El. & Bl. 439; *Sarazin v. Hamel*, 1863, 32 Beav. 145). The marks may be put on the material itself, or on an attached label (*Blank v. Footman*, 1888, 39 Ch. D. 678); and if the article be sold in long strips or in pieces, each strip or piece must be marked (*Heywood v. Potter*, *supra*; see also *Hothersall v. Moore*, 1892, 9 R. P. C. 27). If the article contains the right marks, the fact that it contains also unnecessary or erroneous ones will not be fatal (*Harper v. Wright*, [1896] 1 Ch. 142).

*Loss of Copyright.*—Copyright may be lost by the proprietor if (a) he does not duly mark the article before delivery on sale (*supra*); or (b) if before delivery on sale he does not deliver to the comptroller the prescribed number of exact representations or specimens of the design (1883, s. 50 (2)); (c) if the design is used in manufacture in a foreign country, and is not used in this country within six months of its registration (*ibid.* s. 54).

*International and Colonial Arrangements.*—These, which are provided for by sec. 103 of the Act of 1883 and sec. 6 of that of 1885, are similar to those which obtain in the case of patents for inventions (see *post*, under PATENTS).

[*Authorities.*—See Edmunds on the *Law of Copyright in Designs*, 1895; Copinger on *Copyright*; Shortt on *Copyright*; Lawson on the *Patents, etc., Acts*.]

**Despecheurs.**—These persons correspond in some foreign countries to our average adjusters, their duties being to make up general average adjustments and apportion the amount of loss and contribution to be borne by each of those interests embraced in a trading adventure where a general average sacrifice has taken place.

**Destructive Insect.**—Provision was made by the Destructive Insects Act, 1877, 40 & 41 Vict. c. 68, for the issue of Orders in Council to prevent the introduction into the United Kingdom of vegetables, etc., likely to contain destructive insects, and the destruction of crops affected by such insects, subject to compensation. The functions of the Privy Council under the Act have been transferred to the Board of Agriculture (52 & 53 Vict. c. 30, s. 2). The local authorities for the enforcement of the Act are County Councils, except in boroughs of 10,000 and over (40 & 41 Vict. c. 68; 51 & 52 Vict. c. 41, ss. 3, 39). Orders have been made under the Act as to the COLORADO BEETLE (*q.v.*), the scare of whose feared advent caused the passing of the Act; and in effect, if not in terms, the Act is directed only against that insect.

**Destructive Substance.**—In *R. v. Martin*, 1877, 62 L. T. Jo. 372, Huddleston, B., ruled that boiling water was not a “destructive substance” within the meaning of sec. 29 of the Offences against the Person Act, 1861, which makes it felony to “cast or throw at or upon or otherwise apply to any person any corrosive fluid or any destructive or explosive substance” with intent to injure such person. Under the repealed statute 1 Vict. c. 85, s. 5, boiling water was held, in *R. v. Crawford*, 1845, 2 Car. & Kir. 129, to be “destructive matter.”

**De Tallagio non concedendo.**—This is a statute of the 25 Edward I. It provides that no tallage or aid shall be levied without the assent of Parliament. And that no officer of the king shall take corn, leather, cattle, or any other goods of any manner of person, without the goodwill and assent of the party to whom the goods belonged. It also prohibits anything to be taken from sacks of wool, on the ground of male-tent or male-tolt. It confirms the charters, together with the liberties and free customs of clergy and laity, and all proceedings in contravention of them are annulled. The *Statutum de Tallagio non concedendo* is recited in the preamble to the Petition of Right, and was recognised as a statute in the case of the King against Hampden in 1637. Another form of this statute in French differs from the Latin form generally known as the *Statutum de Tallagio non concedendo*. It does not contain the word tallage, and omits the amnesty. It renounces “such manner of aids,” whilst the Latin con-

tains no such qualifying words, but distinctly declares that no tallage or aid shall be imposed. Stubbs says that the French form is that in which the enactment became a permanent part of the law, by the exact terms of which the king held himself bound, and beyond the letter of which he did not think himself in conscience obliged to act, in reference to either tallage or prisage.

[*Authorities*.—Stubbs, *Constitutional History*, Statutes of the Realm; Reeves, *History of English Law*.]

**Detention of Goods.**—See DETINUE. A magistrate has power to order the delivery to the owner of goods detained without just cause, within the metropolitan police district, and not being of greater value than £15, either unconditionally or upon tender of a sum due in respect of them (2 & 3 Vict. c. 71, s. 40). The refusal of an order does not cover an action of detinue (*Dover v. Child*, 1875, 1 Ex. D. 172), nor does the order, if made, cover an action within six months by the respondent to try the title (s. 40), or an action by the applicant for damages for the detention (*Metropolitan Ry. v. Martin*, [1893] 2 Q. B. 172). A dog is "goods" within the section (*R. v. Slade*, 1888, 21 Q. B. D. 433).

**Determinable Fee.**—An estate in fee-simple limited to a person and his heirs either until a specified contingency shall happen, which may possibly never happen, or so long as an existing state of facts shall endure, which may possibly endure for ever. Upon the happening of the particular contingency the estate is *ipso facto* determined. An estate granted to A. and his heirs, lords of the manor of Dale, or an estate granted to A. and his heirs as long as a particular tree shall stand, are examples of determinable fees.

[Challis, *Real Property*, 2nd ed., c. xvii.]

**Determinable Future Time.**—A bill of exchange or promissory note to be valid must be payable either on demand or at a fixed date or at a determinable future time. A bill is payable at a determinable future time within the meaning of the Bills of Exchange Act, 1882, "which is expressed to be payable (1) at a fixed period after date or sight; (2) on or at a fixed period after the occurrence of a specified event which is certain to happen though the time of happening may be uncertain" (s. 11).

**Determinable Life Estate.**—An estate which may by possibility be determined before the death of the grantee, e.g. an estate given to a widow during widowhood. In the example just given it is not certain at the time the grant is made that the widow will remarry, the estate may therefore last for her life; if, however, she should remarry, the estate is at once determined.

**Detinue.**—Detinue was the appropriate form of action for the recovery *in specie* of goods wrongfully detained from the plaintiff by the defendant, or their value, to be assessed by the jury, and also damages occasioned by their detention (Fitz, N. B. 138, *Writ of Detinue*; 3 Black.



*Com.* 152; *Vin. Abr. Detinue*; *Crossfield v. Such*, 1852, 8 Ex. Rep. 159). The gist of the action was the detainer of goods, to the immediate possession of which the plaintiff was entitled, against the plaintiff's will (*Crossfield v. Such*, *supra*; *Latter v. White*, 1872, L. R. 5 H. L. 578; cp. CONVERSION, ACTION OF). The rules affecting the action of detinue, so far as they were part of the substantive law, apply to an action based upon the same wrong, although the form of action has been abolished. Thus a claim by the liquidator of a company in detinue cannot be met by a defence of set-off of a debt under the mutual dealings section of the Bankruptcy Act (1883, s. 38, and Judicature Act, 1875, s. 10), because the judgment sought in the action is primarily for the return of the goods, although the defendant might (usually, see below, 7.) defeat it by paying the value instead (*Eberle's Hotel, etc., Co. v. Jonas*, 1887, 18 Q. B. D. 459).

The name *detinue* is still retained for such an action (Appendix C to R. S. C. sec. vi. No. 2).

The goods must be specifically described in the pleadings (*Taylor v. Wells*, 2 Wms. Saun. 74, b; Bullen and Leake's *Pleadings*, 5th ed., p. 408). "They must be ascertained in point of identity" (3 Black. p. 152).

1. *The Plaintiff's Title*.—The plaintiff must show he was entitled to delivery of the goods claimed (per Bayley, B., in *Gledstone v. Hewitt*, 1831, 1 Crompt. and J. at p. 570; see next case), that is to say, to the immediate possession of the goods. The right may arise from an absolute, or a special property in them, e.g. if he has an agreement with his co-owner that he shall keep possession (*Nyberg v. Handelslaar*, [1892] 2 Q. B. 205). The rule is the same as in "trover" (see also *Armory v. Delamirie*, 1714, 1 Stra. 504, 1 Smith's L. C. and notes; *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44, cited below).

A lien on the goods by the defendant is a good answer, unless the amount was tendered, or the plaintiff was ready and willing to pay, and tender was excused. So the action failed where a pledgee had sub-pledged to the defendant, and the debt excused remained unpaid (*Donald v. Suckling*, 1866, L. R. 1 Q. B. 585). A wrongful assertion by the pledgee that the pledge was a sale does not excuse a tender of the amount due (*Yungmann v. Brierman*, 1893, 67 L. T. 642). If the only defence is a lien, liberty may be obtained by the plaintiff to pay a sum into Court to cover the whole amount claimed (*Gebruder Naf v. Ploton*, 1890, 25 Q. B. D. 13), together with interest and costs, if so ordered, and a summary order for delivery to him of the property (Order 50, r. 8).

Title deeds belong to the legal owner of the land to which they relate, unless something has occurred to sever the property in the land from that in the deeds (see *Lord Buckhurst's* case, 1 Rep. Ch. 1, and a table of rules showing who is entitled to the custody of the deeds in Hood and Challis' *Conveyancing Acts*, 4th ed., p. 43; see also DEPOSIT). A tenant for life may sue for them in detinue (*l.c. Attwood v. Heywood*, 1863, 1 H. & C. 745; *Leathes v. Leathes*, 1877, 5 Ch. D. 221). He cannot bar the reversioner's right to them after his death (*Easton v. London*, 1863, 33 L. J. Ex. 34). The owner of part of the lands cannot claim the deeds (*Wright v. Robotham*, 1886, 33 Ch. D. 106, in this case they were ordered to be deposited in Court), and no one of several owners in common of the land who happens to have the deeds can be sued for them (see the last case and the next). An equitable owner cannot sue the legal owner, e.g. his trustee (*Foster v. Crabb*, 1852, 12 C. B. 136, 379) or mortgagee after tender of the sum due (*Bank of New South Wales v. O'Connor*, 1889, 14 App. Cas. 273), for the deed.

The right to the title deeds may be separated from the title to the land, e.g. by a sale or gift by an owner in fee (see notes to *Lord Buckhurst's* case, *supra*). So if a policy of insurance is given away without an assignment in writing of the policy moneys (*Rummen v. Hare*, 1876, 1 Ex. D. 169), or a bond without an assignment of the money secured (*Barton v. Garner*, 1858, 3 H. & N. 387), the representative of the donor cannot recover it.

The possessor of land is entitled, as against the finder of chattels found buried in it, to the chattels (*South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44, a ring; *Elwes v. Brigg Gas Co.*, 1886, 33 Ch. D. 562, a pre-historic boat), but not to chattels dropped in a public place, e.g. a shop (*Bridges v. Hawkesworth*, 1851, 21 L. J. Q. B. 75). See further, CONVERSION, ACTION OF; and POSSESSION.

Letters may be sued for by the person to whom they were written and sent (*Oliver v. Oliver*, 1861, 11 C. B. N. S. 139); so may goods be distrained, after tender of the amount due (*Loring v. Warburton*, 1858, El. B. & E. 507), and before they are impounded (*Singleton v. Williamson*, 1862, 7 Hem. & M. 747).

Where owners in common have made a joint deposit of the goods, they cannot be recovered from the deposittee until a demand by, or on behalf of, all has been made (*Atwood v. Ernest*, 1853, 13 C. B. 881; *Harper v. Godsell*, 1870, L. R. 5 Q. B. 422). A joint-tenant cannot maintain the action against his co-tenant (*l.c.* at p. 423).

A bailee cannot set up a *jus tertii* to the goods against the plaintiff, even where the latter has directed him to deliver to the third person (*Castellain v. Thompson*, 1862, 7 L. T. 424), except by showing that he is defending the action on behalf of, and by authority of, the third person (*Rogers v. Lambert*, [1891] 1 Q. B. 318).

As to stolen goods and goods sold in market overt, see SALE and MARKET OVERT; and also Bullen and Leake, 5th ed., p. 891.

2. *The Defendant's Possession.*—The action will not lie against a sole defendant who has done nothing more than direct a third person in possession of the goods not to deliver them to the plaintiff (*Latter v. White*, 1872, L. R. 5 H. L. 578). It is no defence that the defendant wrongfully sold the goods (*Jones v. Dowle*, 1841, 9 Mee. & W. 19), or lost them, unless circumstances are alleged which exonerate him from liability for loss (*Reece v. Palmer*, 1858, 5 C. B. N. S. 91), even though the sale or loss were before demand, and before the plaintiff's title accrued (see *Bristol, etc., Bank v. Midland Rwy. Co.*, [1891] 2 Q. B. 653). In *Crossfield v. Such* (1858, 8 Ex. Rep. 825), however, it was held that an administrator could not recover goods of the intestate which the defendant had parted with before the grant of letters of administration.

3. *Detention against the Plaintiff's wish; Demand.*—The usual evidence of adverse detention is that the defendant, having, or having had, the goods, refused to deliver them up on demand (*Jones v. Dowle*, 1841, 9 Mee. & W. 19; *Miller v. Dale*, [1891] 1 Q. B. 468), and a refusal to deliver is part of the cause of action (*l.c.*; *In re Tidd*, [1893] 3 Ch. 154).

A tender to the plaintiff after the demand relied on is a good defence (*Clements v. Flight*, 1846, 9 Mee. & W. 42), but not if delivery was offered only subject to conditions which the defendant was not entitled to make, e.g. that a receipt should be given (*Barnett v. Crystal Palace Co.*, 1861, 2 F. & F. 443).

Where the goods had been delivered under a magistrate's order (see DETENTION OF GOODS) by the owner, he was held to be entitled to recover damages for their detention by action (*Midland Rwy. Co. v. Martin*, [1893] 2 Q. B. 172).

4. *Delivery after Action brought*.—This is a defence to the action, except so far as damages for the detention are sought (*Crossfield v. Such*, 1852, 8 Ex. Rep. 159; *Leader v. Rhys*, 1861, 10 C. B. N. S. 369). The Court will stay the action on such delivery and payment of costs if no special damages for detention are claimed, and, if the plaintiff insists on going on, he will proceed at his own risk as to costs (Chitty's *Archbold's Practice*, 14th ed., p. 367; *Hort v. L. and N.-W. Ry. Co.*, 1879, 4 Ex. D., at p. 195; *Ellis v. Naunson*, 1876, 35 L. T. 585; *Lyons v. Keller*, 1864, 15 Ir. R. C. L. App. 1). As to cases where the defendant claims a lien, see above, 1.

5. *Damages*.—The damages are the value of the goods, unless they have been returned before the trial (see above, 4.); and, in any event, nominal damages for the detention, or substantial damages if such have been incurred and are claimed. Under the last head the loss by fall in value of stock or goods between the dates of demand and refusal and the date of actual delivery may be given (*Williams v. Archer*, 1847, 5 C. B. 318). The damages are not limited to the loss already incurred at the issue of the writ (see *Serrao v. Noel*, 1885, 15 Q. B. D. 549, and Order 36, r. 58).

An interlocutory order obtained by the plaintiff in the action to restrain the defendant from selling the goods does not prevent the plaintiff recovering damages for loss due to a subsequent fall in value, since his loss is due to the defendant's wrongful refusal to deliver the goods (*Williams v. Peel River Co.*, 1887, 55 L. T. 689; see *Peruvian Guano Co. v. Dreyfus*, [1892] App. Cas. 116); but the delivery of the goods to a receiver appointed by the Court does (*l.c.*). And if the action is stayed by consent upon delivery, damages for the detention cannot afterwards be claimed (*Serrao v. Noel*, 1885, 15 Q. B. D. 549).

The value of the articles claimed should be proved and assessed separately, because some only may be delivered under the judgment (*Anderson v. Passman*, 1835, 7 Car. & P. 193; *Pawley v. Holly*, 1773, 2 Black. W. 853; *Sandford v. Alcock*, 1842, 10 Mee. & W. 689). In the last case the judgment was awarded by the judge so as to distribute the sum assessed.

6. *The Statute of Limitations* (21 Jac. 1. c. 16) runs from the demand (or refusal to deliver) (*Miller v. Dale*, [1891] 1 Q. B. 468; *Spackman v. Foster*, 1883, 11 Q. B. D. 99; *Wilkinson v. Verity*, 1871, L. R. 6 C. P. 206).

7. *The usual Judgment* is for the delivery of the goods, or if they be not delivered for their value as assessed, and damages for the detention (*Crossfield v. Such*, 1852, 8 Ex. Rep. 159; Chitty's *Forms*, 12th ed., p. 377).

It is a bar to a further action for the goods (*Chilton v. Carrington*, 1855, 16 C. B. 206; see *Serrao v. Noel*, cited above, 5., either against the same defendant or a joint tortfeasor with him (*Brinsmead v. Harrison*, 1871, L. R. 6 C. P. 584, 7 C. P. 547), but it does not pass the property in the goods to the defendant until the alternative judgment for the value has been satisfied (*In re Searth*, 1874, L. R. 10 Ch. 234; *Ex parte Drake*, 1877, 5 Ch. D. 866). A magistrate's order for delivery is no bar to the action for damages for detention (*Midland Ry. v. Martin*, [1893] 2 Q. B. 172).

Specific delivery may be ordered in the alternative instead of the judgment, and enforced by a writ of delivery (Order 48, r. 1, following sec. 78 of the Common Law Procedure Act, 1854). The order may be appealed against (*Chilton v. Carrington*, 1855, 15 C. B. 730). It cannot be made unless the value has been assessed (*l.c.* *Cobbett v. Lewin*, 1884, W. N. 62; *sed quare*, see the rule). It may be made in the County Court (*Winfield v. Boothroyd*, 1886, 54 L. T. 574). In equity, delivery of property having a *pretium affectionis* could always be obtained (*Pasey v. Pasey*, 1684, 1 Vern. 273; *Duke of Somerset v. Cookson*, 1735, 3 P. Wms. 389, and Notes in 1

White and Tudor's L. C. to these cases), but not where damages would be an adequate remedy, *e.g.* where the plaintiff and defendant had agreed on the price of a picture (*Dowling v. Betjemann*, 1861, 2 John. & H. 544).

Separate writs of execution may be issued for delivery and for the damages (Order 48, rr. 1, 2).

For the purposes of costs, the sum recovered is the value, plus the special damages (if any) (*Leader v. Rhys*, 1861, 10 C. B. N. S. 369; *Danby v. Lamb*, 1861, 31 L. J. C. P. 17), and the action is "founded on tort" (*L. C. Bryant v. Herbert*, 1877, 3 C. P. D. 389).

**De ventre inspiciendo**—A writ which lay where a woman after the death of her husband pretended to be with child to the disherison of the heir. It was addressed to the sheriff, and ordered him to take with him twelve knights and twelve matrons, and to cause the woman to be examined in the presence of himself and the knights. If the matrons declared that the woman was with child she was kept in safe custody until delivery. If she had no child within forty weeks after the death of her husband she was punished by fine and imprisonment. If she had a child within the forty weeks, such child was admitted to the inheritance, unless the next heir could show that the child was begotten by another man. It is clear from Bracton (ed. 1569, p. 69 a) that in the time of Henry III. a writ was used which differed considerably in form from that contained in the *Registrum Omnium Brevium*, 1595. See *Willoughby's case*, 1597, 1 Cro. (1) 566, and *Theaker's case*, 1626, 1 Cro. (2) 686.

**Deviation.**—This is a technical term in commercial law, meaning the departure of a ship from the course of navigation which is either usual and proper, or one expressly agreed to be followed on the voyage, with reference to which the contract is made. The contracts under which deviation can take place are those of *bottomry*, *affreightment*, and *marine insurance*.

With regard to *bottomry*, it is only necessary to say here that a bottomry bond, which has been given by a shipowner or master upon the security of ship or cargo, or both, in order to enable a ship to complete a particular voyage, becomes void at once on the ship deviating from the proper course for that voyage without a justifiable cause or necessity (*London and Midland Bank v. Nielson*, 1895, 1 Com. Cas. 18; and see *BOTTOMRY*, vol. ii. p. 225).

In contracts of *affreightment* it is an implied condition on the part of the shipowner that the ship shall prosecute her voyage with reasonable dispatch and without unnecessary deviation (*Scaramanga v. Stamp*, 1879, 4 C. P. D. 316, and 5 *ibid.* 295; *Leduc v. Ward*, 1888, 20 Q. B. D. 475; and see *AFFREIGHTMENT*, vol. i. p. 188).

The proper course of the voyage (to depart from or delay on which is a deviation) may be either fixed by express terms (which can hardly ever be done) or left to custom and seamanship to determine. Subject to these, the ship's course should be "the ordinary sea track from one port to another" (Lord Esher, M. R., *Leduc v. Ward*, above), or that which is the most direct safe course to her destination (Carver, 285). Where the destination is a number of places, they must be visited in the order in which they are named in the contract, unless there is a recognised custom in the particular trade to the contrary which is compatible with the terms

of the contract. If the various places are only described generally, *e.g.* ports in a particular area, they must be visited in their geographical order, in the absence of any such custom as that described above to the contrary.

Deviation under a contract of affreightment may be justified either by express permission in the contract or by necessity. In the former case this may be by a clause giving liberty to the ship "to call at any port in any order," or "to deviate for the purpose of saving life or property." Such a clause does not justify a ship in leaving the direct course between her ports of loading and discharge, and putting into another port twelve hundred miles off that course, for the "ports" must be ports which will be passed on the named voyage (Lord Esher, *Leduc v. Ward*, above); and if the words "in any order," after "ports" were not added, the ship must visit the ports in their geographical order (*ibid.*): for "the liberty of deviation must be one consistent with the main object of the contract—a liberty only to proceed to and stay at the ports which are in the course of the voyage" (Lord Herschell, *Glynn v. Margeson*, [1893] App. Cas. 351; consult also *Caffin v. Aldridge*, [1895] 2 Q. B. 366; and Barnes, J., *The Dumbeth*, [1897] Prob. 133). In the second case, *viz.* deviation from necessity, the general rule has been thus stated: "The voyage being fixed by the contract of affreightment, it is the duty of the master to proceed to the port of delivery without delay and without any unnecessary departure from the direct or usual course. Circumstances may arise which render it necessary to depart from this usual course; and tempestuous weather injuring the ship and rendering it necessary to put into a port of repair is one of those circumstances. When a ship is thus injured, it is the duty of the master to do the best he can for all concerned; but his primary duty being to complete the voyage with as little delay as possible, his first care ought to be to get his ship repaired as soon as possible, and to resume his voyage as quickly as he can. By 'possible' and 'necessary' is meant reasonably possible and reasonably necessary; and in considering what these are every material circumstance must be taken into account, *e.g.* danger, distance, accommodation, expense, time, and so forth" (Lindley, L.J., *Phelps v. Hill*, [1891] 1 Q. B. 610; and see the judgment of Lopes, L.J., *ibid.*).

Deviations are thus justified, which are made—(1) in order to avoid danger to the adventure, *e.g.* capture by hostile cruisers in time of war (*The Teutonia*, 1871, L. R. 3 Ad. & Ec. 394, and 4 P. C. 171), though not to avoid what is only a temporary impediment or danger (Carver, 290); (2) to avoid a danger peculiar to either ship or cargo, *e.g.* ship owned by belligerents and cargo by neutrals in time of war (*The Teutonia*, above), or cargo deteriorating on the voyage owing to the ship's stranding while leaving the port of loading and straining her waterways and deck (*The Roma*, 1884, 5 Asp. 259), provided in this case that the delay or deviation is made not only for the sake of the particular interest, but also for that of the whole adventure (*Notara v. Henderson*, 1872, L. R. 7 Q. B. 237, Willes, J.); (3) in order to save life on board another vessel in distress, or to communicate with a vessel in distress (*Scaramanga v. Stamp*, 1880, 5 C. P. D. 295); (4) in order to save property "if the preservation of life can only be effected through the concurrent saving of property, and the *bond fide* purpose of saving life forms a part of the motive which leads to the deviation; for the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating. But a deviation for the purpose of saving property is not thus privileged, but entails all the usual consequences of deviation. If, therefore, the lives of persons on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of

saving the ship will carry with it all the consequences of an unauthorised deviation" (Cockburn, C.J., *Scaramanga v. Stamp*, above). The shipowner, however, may (and often does) stipulate by his contract for the right "to tow and assist vessels in all situations"; but to be covered by this clause it seems that the deviation must at the time be apparently consistent with the main purpose of the voyage (*Stuart v. British and African S. N. Co.*, 1875, 32 L. T. 257; Carver, 292 a).

If, however, the deviation is not justified (as not being necessary except for a default of the shipowner, *Taylor v. G. N. Ry. Co.*, 1866, L. R. 1 C. P. 385), the shipowner is liable for any loss or damage to the goods occurring during the time that the ship is off her course, and attributable to the deviation, though actually caused by a peril excepted in the contract of sea carriage (*Ellis v. Turner*, 1800, 8 T. R. 531; 5 R. R. 441; and see *Daris v. Garrett*, 1830, 6 Bing. 724; so *Balian v. Joly*, 1890, 6 T. L. R. 345; *Phelps v. Hill*, [1891] 1 Q. B. 605). In *Daris v. Garrett* (above), Tindal, C.J., said, in answer to the objection that the deviation and the loss were unconnected, "If a loss has actually happened whilst the wrongdoer's wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done."

This reasoning will equally make the shipowner liable for loss happening after the deviation is over; and this view is strengthened by the fact that by insurance law, if the ship deviates from her course, the assured loses his protection under the policy whether the loss be during or after the deviation (Carver, 288).

In policies of marine insurance deviation means the same thing as in contracts of affreightment, namely, either (1) unreasonable delay in prosecuting the voyage insured, or (2) an unnecessary departure from the proper course to be followed on that voyage. In either case the underwriter is entitled to be discharged from his contract from the moment that the deviation is actually entered upon.

As regards the first, any delay, whether in the port of sailing after the policy has attached or on the voyage, which is not *bonâ fide* incurred with a view to promote and carry out the main object of the voyage insured, is a deviation, although a delay may be very considerable without being unreasonable, for its reasonableness depends on the circumstances of the particular case (Arnould, 491, citing *Palmer v. Marshall*, 1832, 8 Bing. 79; *Grant v. King*, 1802, 4 Esp. 175; 6 R. R. 849; and other cases).

As regards the second, it is a deviation if the course of the insured voyage is specifically designated by the policy, and that course is departed from, even though the ordinary usage allows of putting into other ports than those mentioned in the policy, and the premium would be the same (*Elliott v. Wilson*, 1776, 7 Bro. P. C. 459); or if the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from (*Cormack v. Gladstone*, 1809, 11 East, 347; 10 R. R. 518); or if the course of the voyage is not prescribed by the policy or by custom, but the course which would be taken by a prudent master navigating the ship in a seamanlike manner is departed from with the privy of the assured (*Middlewood v. Blakes*, 1797, 7 T. R. 162; 4 R. R. 405; Marine Insurance Bill, 1896); but if the assured is ignorant of the master's conduct, whether it amounts to barratry or not, in such a case the underwriter is liable (*Phyn v. Roy. Ex. A. Co.*, 1798, 7 T. R. 505; 4 R. R. 508;

*Earle v. Rowcroft*, 1866, 8 East, 126; 9 R. R. 385; and see BARRATRY, vol. ii. p. 25).

Where several ports of discharge are specified by the policy, it is no deviation if the ship visits only some and not all of them; but in such a case, if she proceeds to more than one, she must visit them in the order in which they stand in the policy (*Marsden v. Reid*, 1803, 3 East, 571), unless there is a sufficient cause or a usage not inconsistent with the terms of the policy justifying her in departing from that order (*Gairdner v. Senhouse*, 1810, 3 Taun. 16; 12 R. R. 573; *Beatson v. Howcorth*, 1796, 6 T. R. 531; 3 R. R. 258). If the policy is "to ports of discharge" within a given area which are not named, the ship must visit them, or such of them as she goes to, in their geographical order, or it will be a deviation, unless there is a usage or sufficient cause justifying her in departing from that order (*Clason v. Simmonds*, 1796, 6 T. R. 533; 3 R. R. 260; *Gairdner v. Senhouse*, above; Marine Insurance Bill, 1896).

As deviation is a breach of the implied condition or warranty on the part of the assured, it is immaterial whether the loss for which he claims compensation from the underwriter is or is not connected with the deviation, and whether it happens during the deviation, or whether the ship has regained the proper course before the loss happens (*Company of African Merchants v. British and Foreign M. I. Co.*, 1873, L. R. 8 Ex. 154; *Thompson v. Hopper*, 1856, 6 El. & Bl. 187, Lord Campbell). But a deviation does not avoid the policy *ab initio*, as a breach of the warranty of seaworthiness does, and the underwriter remains liable under the policy for any loss which has happened prior to the deviation, and it is a question of fact what losses are or are not subsequent to the deviation (*Green v. Young*, 1702, 2 Salk. 444; *Hare v. Travis*, 1827, 7 Barn. & Cress. 14). The underwriter may also waive his right to put an end to the contract by showing that he acquiesces in the deviation, whether by express terms or by inference from his conduct (*Weir v. Aberdeen*, 1819, 2 Barn. & Ald. 320; 20 R. R. 450; *Quebec M. I. Co. v. Comm. Bank of Canada*, 1869, L. R. 3 P. C. 234). It is important to remember that the mere intention to deviate is immaterial, and unless that intention is put in force the policy is good (see *Kingston v. Phelps*, 1795, 7 T. R. 165). This is the essential difference between a deviation and a change of voyage, for in the latter case the underwriter is discharged from his contract by evidence of an intention having been formed by the assured to alter the voyage (*Parkin v. Tunno*, 1809, 11 East, 22; 10 R. R. 422).

Deviation from the course or delay on the voyage contemplated by the policy is excused or justified in the following cases:—(a) By special terms in the policy, e.g. liberty to "call," or "touch," or "touch and stay," or "trade." With regard to this there are three general rules established by the decisions, namely, (1) the port visited under such a liberty must be within the contemplated course of the voyage (*Hogg v. Horner*, 1797, Par. 444; *Lavabr v. Wilson*, 1779, 1 Doug. 284), unless the wording of the policy allows full effect to be given to the words, when even intermediate voyages may be justified (Arnould, 473, quoting the cases); (2) if the port visited is within the terms of the policy, the purpose of the visit must be connected with the main purpose of the adventure (*Langhorne v. Allnutt*, 1812, 4 Taun. 512; 13 R. R. 663, Gibbs, J.; *Williams v. Shee*, 1812, 15 East, 278; 14 R. R. 811, Lord Ellenborough; and see *Hammond v. Reid*, 1820, 4 Barn. & Ald. 72; 22 R. R. 629; *Solly v. Whitmore*, 1821, 5 *ibid.* 45; 24 R. R. 274; *Bottomley v. Bovill*, 1826, 5 Barn. & Cress. 210); (3) if the port be visitable, it is not a deviation to trade there even though this be

foreign to the main purpose of the voyage, if no additional delay or change of risk is caused thereby (*Raine v. Bell*, 1808, 9 East, 195; and other cases at Arnould, 482 ff.; 9 R. R. 533): (b) if the deviation or delay is caused by circumstances beyond the control of the shipowner or master, whether due to human or natural causes (*Elton v. Brogden*, 1747, 2 Stra. 1264; *Harrington v. Halkeld*, 1778, Par. 455): (c) if the deviation or delay is necessary in order to comply with an express or implied warranty, e.g. warranty of convoy (*Bond v. Gonzales*, 1704, 2 Salk. 445) or of seaworthiness: (d) if the deviation or delay is reasonably necessary for the safety of the ship or subject-matter insured, whether the danger be a peril insured against or not (*Guibert v. Redshaw*, 1781, 2 Par. 637; *Woolf v. Clagett*, 1800, 3 Esp. 257); but if the ship was originally unseaworthy or deficient in equipment when she started on the voyage, it is a deviation (*Forshaw v. Chabert*, 1821, 3 B. & B. 158): (e) if the deviation or delay is made in order to save life or aid a ship in distress where life is in danger (*Scaramanga v. Stamp*, 1880, 5 C. P. D. 580): (f) if it is caused by barratry, whether barratry be insured against or not (see *ante*, and *Roscoe v. Corson*, 1819, 8 Taun. 684; 21 R. R. 507).

When the cause excusing or justifying deviation or delay ceases to operate, the ship must resume and prosecute her voyage with reasonable despatch; and she must return to her course by the most safe and direct course, and not to the point where she left it (*Harrington v. Halkeld*, *ante*; *Delancy v. Stoddart*, 1785, 1 T. R. 22; 1 R. R. 139). Where express permission is given in the policy to delay for a specified time, it must not be exceeded, even where a *vis major*, e.g. blockade, intervenes (*Doyle v. Powell*, 1832, 4 Barn. & Adol. 267).

[*Authorities*.—Arnould, *Marine Insurance*; Carver, *Sea Carriage*; Marine Insurance Bill, 1896; and see MARINE INSURANCE.]

**Device.**—One of the alternative essential particulars enumerated in sec. 64 (1) of the Patents, Designs, and Trade Marks Act, 1883 (as amended by sec. 10 of the Act of 1888), which a trade mark must consist of or contain to be qualified for registration, is a distinctive device. A combination of English letters, or a single letter, is not a device (*Ex parte Stephens*, 1876, 3 Ch. D. 659; *In re Mitchell's Trade Mark*, 1877, 7 Ch. D. 36), nor is an arrangement of coloured stripes (*Hanson's Trade Mark*, 1887, 37 Ch. D. 122). But a word in Oriental characters has been allowed (*Rotherham's Trade Mark*, 1878, 14 Ch. D. 585; see *Dewhurst's Trade Mark*, [1896] 2 Ch. 137). A portrait may be a distinctive device (*Rowland v. Mitchell*, [1897] 1 Ch. 71; but *cp. Anderson's case*, 1885, 26 Ch. D. 409, on appeal 54 L. J. Ch. 1084). A device frequently consists of a combination of other devices (see Report of Lord Herschell's Committee, quoted in Kerly on *Trade Marks*, p. 130). So much of the device as is common to the trade is not, of course, distinctive (see *Baker v. Rawson*, 1890, 45 Ch. D. 533; *Kaku's Trade Mark*, 1878, 53 L. J. Ch. 238 n.). The question how far a picture of the goods may be distinctive, is somewhat unsettled (see Kerly on *Trade Marks*, p. 131; *James Trade Mark*, 1885, 31 Ch. D. 340; 33 Ch. D. 392; and *Sphincter Co. Trade Mark*, 1893, 10 R. P. C. 84).

**Devise.**—This term strictly applies to a testamentary gift of lands or real property, but, as a matter of fact, it is often used as equivalent to (the verb) "bequeath" or (the noun) "legacy" in testamentary gifts of



personal property (see *Camfield v. Gilbert*, 3 East, at p. 521; 7 R. R. 892). Occasionally the distinction is operative to some extent. Thus in that case it was held that the word *devise*, "when applied to effects alone, will not carry real estates" (1 Jarman on *Wills*, p. 692 n., 5th ed.; see also *Phillips v. Beal*, 1858, 25 Beav. 25; *Coard v. Holderness*, 1855, 20 Beav. 147). See BEQUEATH and WILL.

**Diary.**—The question whether a solicitor's diary is admissible as secondary evidence after his death of the matters entered in it, under the rule in *Price v. Torrington* (see *sup.* p. 163), is still unsettled. In several cases the entries have been admitted, *e.g.* to prove the execution of a deed by the solicitor's client (*Rawlins v. Richards*, 1860, 28 Beav. 370; *Waldy v. Gray*, 1875, L. R. 20 Eq. 238), but in a recent case (*Hope v. Hope*, 1893, W. N. 20) the Court of Appeal expressed an opinion that the authorities needed to be reconsidered.

In order to make the entries admissible it must be shown that they were made in pursuance of some duty on the part of the person who made them, and the Court said they could not see what duty the solicitor owed to anybody but himself. In *Ex parte Swinbanks* (1879, 11 Ch. D. 525), however, James, L.J., said it is the duty of a solicitor to keep a diary, and enter therein a record of the business he does for his clients.

**Dice.**—Playing at dice is treated as an unlawful game by the Act 33 Hen. VIII. c. 9; and by Acts of 1739 (13 Geo. III. c. 19, s. 9) and 1744 (18 Geo. II. c. 24) all games with dice, except backgammon and kindred games, are prohibited, and treated as illegal lotteries (see GAMING). At one time duties of customs and excise were levied on dice, but since 1876 they have ceased.

**Die by his own hands.**—See COMMIT SUICIDE, vol. iii. p. 131.

**Die without Children.**—This phrase was construed in *In re Hambleton*, *Hamilton v. Hambleton*, 1884, W. N. 157, as signifying "die without having had a child."

**Die without Issue.**—By the Wills Act, 1837, which applies to wills made on or after 1st January 1838, it is provided (s. 29) that in any devise or bequest of real or personal estate words such as "die without issue," or "die without leaving issue," or "have no issue," which may import either an indefinite failure of issue, or failure of issue in the lifetime or at the death of such person, "shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live

to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue." "Since this enactment a devise to A. and his heirs or to A. indefinitely, with a limitation over to take effect on the death of A. without issue, or without having or leaving issue, which previously would have given A. an estate tail, will now give A. an estate in fee, with an executory devise over in the event of his death without issue living at his death. So a gift of personalty to A. with a bequest over to B. upon the death of A. without issue will take effect as a contingent executory bequest upon the death of A. without issue living at his death; previously the gift over would have been void for remoteness. [Hawkins, *Construction of Wills*, 214, 215; Jarman, *Wills*, 5th ed., chs. xl. and xli., where the subject is fully treated.]

**Diem clausit extremum.**—A special writ of extent issued to the sheriff to seize the property of a deceased Crown debtor; it is so called because it recites the death of the debtor. It is issued on an affidavit of debt and death. See EXECUTION.

**Differences, Contracts for.**—See GAMBLING CONTRACTS.

**Dilapidations.**—The general law as to dilapidations is dealt with under the heading REPAIRS. See also next article.

**Dilapidations, Ecclesiastical.**—An ecclesiastical dilapidation, according to Degge (*Parson's Counsellor*, ch. viii. p. 104, 7th ed.), is "the pulling down or destroying in any manner of the house or buildings belonging to a spiritual living or the Church, or suffering them to run into ruin or decay; or wasting or destroying the woods of the Church, or committing or suffering any wilful waste upon the inheritance of the Church." The remedies for waste are various (see articles, WASTE; GLEBE; INCUMBENT). It is here proposed to treat under the term "ecclesiastical dilapidations" such dilapidations only as would at common law entitle an incumbent to bring an action for damages against his predecessor, or his predecessor's personal representatives, and dilapidations, within the meaning of the Ecclesiastical Dilapidation Acts of the Victorian reign. The right of an incumbent to recover damages for dilapidations from the representatives arises from a peculiar custom, and does not agree with the general principles of the common law. In any event, an ecclesiastical corporation sole would at common law be liable to a suit in an Ecclesiastical Court; or an injunction in equity or a prohibition from a Superior Court of Law for waste; but the fact that a succeeding incumbent is enabled by custom to bring an action against the representatives of a deceased incumbent, in respect of a tort for which the deceased person would not in his life have been liable to him, constitutes an exception to the general maxim of the law that *ACTIO PERSONALIS MORITUR CUM PERSONA*. As to the history and growth of custom, see *Prov. Const.* 2L Hen. III. Lind. (1) tit. 27, p. 250; *Year Books*, H. 4, Co. 3, pl. 7; 15 Hen. VIII. roll 306; Horne, *Pleader*, p. 136.

The custom was one of gradual growth, and it arose out of the necessity of preventing the houses of incumbents falling into ruins.

The law and custom binding on incumbents extends only to dilapidations of building, and will not cover waste of the glebe or other lands (*Ross v. Adcock*, 1868, L. R. 3 C. P. 657). As to *Huniley v. Russell*, 1849, 13 Q. B. 572, see remarks of the Court in *Ross v. Adcock*, *supra*, pp. 669 and 670, and note.

A perpetual curate is at common law liable for dilapidations (*Mason v. Lambert*, 1848, 12 Q. B. 795), as is also a vicar-choral, if he has a house in respect of his office.

As to the liability of a non-resident spiritual person, see 57 Geo. III. c. 99, s. 14; as to fraudulent donees of the goods of incumbents liable for dilapidations, see 13 Eliz. c. 10.

All moneys recovered in respect of dilapidations shall, under 14 Eliz. c. 11, be truly employed within two years upon such repairs, on pain of forfeiture of double the sum received to the Crown.

The general principle to be followed in ascertaining the amount of liability for ecclesiastical dilapidations is laid down in *Wise v. Metcalfe*, 1829, 10 Barn. & Cress. 299, viz. that an incumbent is bound to maintain the parsonage and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding when necessary, according to the original form; but he is not bound to supply or maintain anything in the nature of ornament, in which painting (unless necessary to preserve exposed timbers from decay), whitewashing, and papering are included. Moneys owing in respect of dilapidations are now treated as a debt.

Statutory provisions with regard to dilapidations, so far as concerns houses of residence, chancels, walls, fences, and such other buildings and things as the incumbent is bound to repair, has now been made by several Acts of the present reign, the first general Acts being the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), and the amending Act of the following year (35 & 36 Vict. c. 96). The Act of 1871 provides (s. 8) that a surveyor or surveyors of ecclesiastical dilapidations shall be appointed either generally or for a term, and either for the whole or part of the diocese, in and for each diocese, by the archdeacons and rural deans, at a meeting convened for that purpose at which the bishop or senior archdeacon present shall preside, the bishop's consent to the appointment being necessary, and he having power to hear complaints against a surveyor, and remove him from office if unfit. Surveyors are to be paid (s. 10), not by salary, but according to a rate of charges to be fixed by the bishop, archdeacons, rural deans, and chancellor; and they are not to be interested in any contract or work to be executed under the Act, unless by a company of which they are shareholders.

The Act first deals with the case of full benefices, which the bishop may (s. 12) order the surveyor to inspect upon a complaint by the archdeacon, rural dean, or patron, or a request by the incumbent. Within a month after his inspection the surveyor is to report to the bishop, and to specify in detail the repairs he deems necessary, their probable cost, and the time within which they ought to be executed (ss. 14, 15). A copy of the report must be sent to the incumbent or sequestrator (if any), and he may within a further month object to it, in which case provision is made for a further reference at the expense of the party objecting; but the bishop's decision is final, and upon the expiration of the further month, the report, if not objected to, is final (s. 16). The incumbent may borrow the whole or part of the necessary sum from the proceeds of Queen Anne's Bounty, the governors of which may lend it upon the security of the possessions of the benefice,

keeping a "dilapidation account" in respect thereof; but the Act of 1872 provides (s. 1) that the amount lent must not exceed three years' income of the benefice. If the benefice be not under sequestration, the incumbent must execute the repairs prescribed; if under sequestration, the cost of the works is a charge on the income of the benefice received by the sequestrator, and is paid by him to the governors, who may execute the works as they receive the money (ss. 19, 20). The incumbent may, on complaint being made, inform the bishop *within twenty-one days* of his intention to execute the repairs, and the bishop shall then allow him a reasonable time for the purpose, and, if satisfied of the execution of the repairs, abstain from further proceedings; but the surveyor may be ordered to inspect the works, and, if they are unsatisfactory, the powers of the Act may be put in force. If an incumbent neglect or refuse to execute the prescribed repairs, the bishop may raise the required sum by sequestration of the benefice (s. 23). With regard to vacant benefices, secs. 29 and 31 of the Act of 1871 direct that within three months of the avoidance of a benefice, the bishop shall direct the surveyor to inspect the buildings of the benefice, and report to him what works are required and what sum (if any) is required to make good the dilapidations to which the late incumbent or his estate is liable, and the bishop is then to make an order for the execution of the repairs, subject to provisions similar to those applying to repairs ordered in the case of a full benefice. Sec. 46, however, provides that on the completion of any works, a final certificate is to be given by the surveyor, and within the next five years no further report is to be made except at the incumbent's request, and if the benefice fall vacant within that time he and his estate are not liable for dilapidations except for wilful waste (s. 47). As to a patron or rural dean making complaint of want of repairs, see sec. 22.

A bishop's order to a surveyor to inspect a vacant benefice and the latter's report thereon are not, however, invalidated by not being made within the three months (*Gleaves v. Murriner*, 1876, 1 Ex. D. 107; *Caldow v. Pixell*, 1877, 2 C. P. D. 562). Any sum for which the late incumbent is liable is recoverable (s. 36) from him or his estate, at law and in equity, by the new incumbent, who may further pay himself by withholding his predecessor's retiring pension (50 & 51 Vict. c. 23, s. 6), and may borrow the remainder of the required sum from the governors. Annexed to the Act is a form of mortgage of the benefice to the governors as security for advances; and subsequent statutes (44 & 45 Vict. c. 25; 49 & 50 Vict. c. 34; and 50 & 51 Vict. c. 8) have enabled the governors to extend the term of payment. Secs. 25-28 of the Act of 1871 enable archbishops, bishops, and dignitaries in cathedral and collegiate churches to employ a surveyor, approved by the Ecclesiastical Commissioners, to inspect their official houses and report on the repairs they require; and the surveyor's certificate of completion exempts the holder of the dignity to which the house belongs and his estate from liability for dilapidations other than wilful waste for five years; though both such a dignitary and an incumbent who is to receive the corresponding benefit of sec. 47 must insure as required by that section (see also ss. 54-57). Previous Acts of 1860 and 1866 (23 & 24 Vict. c. 124, s. 9; 29 & 30 Vict. c. 111, s. 12) had, however, enabled the Ecclesiastical Commissioners to inspect the property of a See, and require the archbishop or bishop to execute the necessary repairs (see ARCHBISHOP; BISHOP); and the Act of 1871 does not seem to affect these provisions.

[*Authorities*.—Lindwood, *Prov.*; Degge, *Parson's Counsellor*; Phillimore, *Ecc. Law*, 2nd ed.; Cripps, *Law of the Church and Clergy*.]

**Dilatory Plea.**—Under the old common law system of pleading, a distinction was drawn between pleas in bar, which, if proved, gave the defendant a final judgment in the action or prosecution (see **BAR**, **PLEA IN**), and dilatory pleas, which, if successful, delayed the action or proceeding and involved no judgment on the merits in fact or law. They are usually classified as (1) pleas in abatement, (2) pleas to the jurisdiction. As to pleas in abatement in criminal cases, see **ABATEMENT** (2); as to civil cases, see Bullen and Leake, *Prec. Pl.*, 2nd ed., 404; **ABATEMENT**, **PLEAS IN**. Pleas to the jurisdiction, where pleaded as dilatory pleas, alleged that the proceeding was not brought in the proper Court. Where some English Court had jurisdiction, it was necessary to specify the Court in which the proceeding ought to have been brought. Where the action was brought in an inferior Court, the writ of **PROHIBITION** (*q.v.*) afforded a better remedy than a plea to the jurisdiction. In the Mayor's Court it was usual, and is still permissible, first to plead to the jurisdiction, and if the plea failed, to apply for prohibition.

Pleas to the jurisdiction were rare in the Superior Courts (Bullen and Leake, 2nd ed, p. 534 *n.*), as the objection, if any, could in these Courts be taken with equal effect by the ordinary pleas in bar. Under the modern system of pleading, the jurisdiction of the Court can be challenged in a civil case (1) by entering a conditional appearance and moving to set aside the writ (R. S. C., 1883, Order 12, r. 30); (2) by entering an appearance under protest, which prevents appearance operating as a waiver of objections to the jurisdiction (*Firth v. de las Rivas*, [1893] 1 Q. B. 768), and then either moving to set aside the writ or stating in the defence the objections to the jurisdiction, which, if matter of law only, can be determined under R. S. C., 1883, Order 25, r. 2 (*Companhia de Moçambique v. British South African Co.*, [1893] App. Cas. 602).

In criminal cases objection to the jurisdiction is usually taken, not by plea in abatement, but by a motion to quash the indictment or under the defence of not guilty. See **BAR**, **PLEA IN**.

**Dilution.**—See **ADULTERATION**; **BEER**.

**Diminution.**—Under the old practice in proceedings in error it was necessary, where there was an error through some part of the record not having been returned, to assign this matter specially; this was termed 'alleging diminution,' and the assignment had then to be verified by a writ of *certiorari*. [Lush, *Practice*, 3rd ed., p. 670.]

**Dimissory Letters.**—Dimissory letters are so called according to Lindwood (*Prov.* p. 32): "quia per eas Episcopus dimittit subditum suum et licentiat ut alibi possit promoveri et quid alius episcopus possit eum ordinare." By a constitution of Archbishop Reynold's, "persons in religion are forbidden to be ordained by anyone but their own diocesan, without letters dimissory from him." Canon 34 of the Canons of 1603 provides that no bishop shall henceforth admit any person into sacred orders who is not of his own diocese, except he be either of one of the Universities of this realm, or except he shall bring letters dimissory so termed from the bishop of whose diocese he is. (As to the penalties to which a bishop is liable who ordains a person from another diocese without proper licence, see Canon 35 of

Canons of 1603; *Conc. Trid. Sess. vii. c. 10*; Gibson, *Cod.* 143.) Persons promoted to holy orders without a licence from their own bishop are liable to suspension until they obtain the same.

An archbishop, as metropolitan, may not grant dimissory letters; but this is not to be understood of his metropolitical visitation of any diocese, when he may grant them. They may not be granted by an archdeacon or official. When a See is vacant, the right of granting letters dimissory is vested in the guardian of the spiritualities; and when a bishop is in parts remote, such letters may be granted by the person who is specially constituted his vicar-general for the time being.

[*Authorities.* — Lindwood, *Prov.*; Gibson, *Cod.*; Phillimore, *Ecol. Law*, 2nd ed.]

**Diocese.**—The word is derived from the Greek word *διοίκησις*, which was used to signify a subdivision of a Roman province, *Cic. fam.* 13, c. 53, and was thence adopted by the Christian Church to designate the sphere of a bishop's jurisdiction. The episcopate of the English Church has been from the earliest times territorial—the country being divided into dioceses all centring round a cathedral church since the first organisation of the Church under Archbishop Theodore. (See article CHURCH OF ENGLAND.)

The Sees of various dioceses were altered in the Norman period. New Sees and dioceses were formed by Henry VIII., and new dioceses have also been created in the present reign. (For a list of the Dioceses of the Church of England, see article ARCHBISHOP.) Under the Act 6 & 7 Will. IV. c. 77, the ancient dioceses of the Church of England have been remodelled by an extension and curtailment of the parishes and counties formerly contained therein (as to this Act and its operation, see Phillimore, *Ecol. Law*, 2nd ed., vol. i., p. 34), and under the Victorian Acts establishing new bishoprics, new dioceses have also been created (see Phillimore, *supra*). When by alterations of the limits of a diocese, a local charitable foundation or other trust of which the bishop of the diocese in his official capacity is a trustee, or over which he has power of nomination or control is removed into another diocese, the Charity Commissioners are at liberty to appoint the bishop of such new diocese trustee of the same in place of the former bishop (see 21 & 22 Vict. c. 71).

**Diplomacy and Diplomatic Service.**—See DIPLOMATIC AGENTS.

**Diplomatic Agents** are the official representatives of a sovereign or a government at the court or seat of government of another country. In ancient Greece ambassadors seem to have filled an important place in the state polity. We are told that "the ambassadors to Philip of Macedon attended him even on marches and journeys," and that "ambassadors, during the time they were compelled to have a fixed residence, were never compelled to live at their own expense; they were supported by presents which they received both in free states and in countries where the government was monarchical. It may be seen from the speech of Demosthenes for the crown that in Greek cities they were not only honoured with the first place in the theatres, but were hospitably entertained, and generally resided at the house of the *proxenus*. . . . In general

the Athenians sent ten ambassadors, but occasionally not more than two or three" (Bœckh, *Public Economy of Athens*, Translation by Sir G. C. Lewis, Lond. 1842, p. 237-8).

Embassies are a necessity in the intercourse of states with each other. With the extension of the Roman Empire over the then practically civilised world, they would naturally survive only to the extent requisite for communication and negotiation with remoter communities not under Roman subjection. With the disruption of the empire came greater and more frequent need of missions abroad. These missions, however, seem only to have been sent for specific purposes, until Louis XI., following perhaps an example set by the Italian Republics among themselves, in the fifteenth century began the practice of appointing regular and permanent embassies to foreign courts. Their advantages seem to have been rapidly appreciated, for we read in Bacon's essay on Henry VII. of England of "the airs which the princes and states abroad received from their ambassadors and agents here, which were attending the court in great number; whom he did not only content with courtesy, reward, and privateness, but upon such conferences as passed with them, put them in admiration to find his universal insight into the affairs of the world; which though he did such chiefly from themselves, yet that which he had gathered from them all seemed admirable to everyone," and again, on his side, "that he was careful to obtain good intelligence from all parts abroad; wherein he did not only use his interest in the liegers here, and in his pensioners, which he had both in the court of Rome, and other the courts of Christendom, but the industry and vigilance of his own ambassadors in foreign parts. For which purpose his instructions were ever extreme, curious, and articulate, and in them more articles touching inquisition than touching negotiation; requiring likewise from his ambassadors an answer, in particular distinct articles respectively to his questions." The custom of appointing men of rank as ambassadors had apparently not yet grown up, for in the same essay we learn that ambassadors were "mean men." During the sixteenth, seventeenth, and eighteenth centuries diplomacy developed, and ambassadors ceased to be "mean" men; on the contrary, they grew into such important personages that their quarrels among themselves as to their respective ranks, and their tendency unduly to extend their still ill-defined privileges, were sometimes a substantive source of misunderstandings and difficulty between the states they represented. As regards precedence, a regulation was drawn up in the protocol by the plenipotentiaries of the eight principal Powers assembled at the Congress of Vienna (March 19, 1815) in the following terms:—

"In order to prevent the inconveniences which have frequently occurred, and which might again arise, from claims of precedence among different diplomatic agents, the plenipotentiaries of the Powers who signed the Treaty of Paris have agreed on the following articles, and they think it their duty to invite the plenipotentiaries of other crowned heads to adopt the same regulation—

"Art. I. Diplomatic agents are divided into three classes—That of Ambassadors, Legates, or Nuncios; that of Envoys, Ministers, or other persons accredited to sovereigns; that of *Chargés d'Affaires* accredited to Ministers for Foreign Affairs. Art. II. Ambassadors, Legates, or Nuncios, only have the representative character. Art. III. Diplomatic agents on an extraordinary mission have not on that account any superiority of rank. Art. IV. Diplomatic agents shall take precedence in their respective classes according to the date of the official notification of their arrival. The present regulation shall not cause any innovation with regard to the representatives of the Pope. Art. V. A uniform mode shall be determined in each state for the reception of diplomatic agents

of each class. Art. VI. Relations of consanguinity, or of family alliance between courts, confer no precedence on their diplomatic agents. The same rule also applies to political alliances. Art. VII. In acts or treaties between several powers which grant alternate precedence, the order which is to be observed in the signatures shall be decided by lot between the ministers."

At the Congress of Aix-la-Chapelle in 1818, the plenipotentiaries agreed upon a supplementary article providing that "ministers resident" were to form an intermediate class between ministers of the second order and *chargés d'affaires*. These regulations are given *in extenso* in the *Foreign Office List*, forming part of the official regulations for the diplomatic service.

It is observed that the Vienna regulations restrict the representative character to ambassadors, and legates, or nuncios. Others are not directly accredited from and to the sovereign. This distinction has lost much of its importance in modern diplomacy (see AMBASSADOR).

Great Britain sends ambassadors of the first class to eight countries, namely: Austria-Hungary, France, Germany, Italy, Russia, Spain, Turkey, and the United States; they are called Ambassadors Extraordinary and Plenipotentiary. Envoys of the second class are sent to eleven countries, namely: Belgium, Brazil, China, Denmark, Greece, Japan, The Netherlands, Persia, Portugal, Roumania, and Sweden and Norway, and are termed Envoys Extraordinary and Ministers Plenipotentiary. Their residences are known as legations in distinction to embassies, or residences of first-class agents. The title of Envoys Extraordinary and Ministers Plenipotentiary is also enjoyed by five ministers of the third class, holding second-class missions, namely: those to the Argentine Republic, Mexico, Morocco, Servia, and Switzerland. Other ministers of the third class holding second-class missions to Central America, Chili, Columbia, Peru, Siam, and Uruguay, are called Ministers Resident and Consuls-General; those to Bulgaria and Egypt are Agents and Consuls-General, and to Bavaria and Saxony, Ministers Resident. Lastly, Great Britain is represented in Montenegro by a *chargé d'affaires* (*q.v.*). *Chargés d'affaires*, forming a fourth class, are also sent to Hesse-Darmstadt and Saxe-Coburg.

The letter of credence by which a diplomatic agent is accredited, sets forth the name of the bearer and his diplomatic rank, and states that the holder is entitled to transact business in the name of his government. His duties commence from the moment he has presented this letter to the sovereign or government to which he is accredited. Until recent times the ceremony of presentation of these letters by an ambassador took place at a public audience, and was of a very solemn nature. The common practice now is to grant a private audience, the ceremonies of which are thus described by the late Sir Travers Twiss: "The sovereign receives the ambassador in the presence of the Minister or Secretary of the State for Foreign Affairs, and the introducer of ambassadors or master of the ceremonies attends to present in due form the ambassador, who makes a short speech explanatory of his mission, presents his letters of credence and retires" (*Law of Nations in Time of Peace*, p. 364).

The duties of a diplomatic agent comprise every matter upon which one state can have communications to make to another as such.

The work of an ambassador or envoy is always conducted through the secretary of embassy or legation, who, in the words of the Diplomatic Regulations, "must be deemed to hold, as regards the chief of the mission, the same position which an Under-Secretary of State holds as regards the Secretary of State, and therefore the whole public business of the embassy



or mission should pass through his hands, and, subject to the orders of the chief, should be carried on under his immediate superintendence. The public and official despatches and papers will, if not opened by the ambassador or minister himself upon their arrival, reach him through the secretary of embassy or legation; and the directions of the chief in regard to all matters will pass through the secretary, and be executed under his superintendence and control. The principle on which this regulation is founded scarcely needs an explanation, for it is obvious that the public interests require that the secretary, who may at any moment in consequence of the absence of the chief be called upon to conduct the public business on his own responsibility, should be kept fully informed as to the course of those matters with which he may have to deal. In the occasional or accidental absence of the secretary from the residence of the mission, or from the Chancery (*q.v.*), the senior attaché in attendance will undertake his duties, so that no inconvenience or delay need arise in the transaction of the public business."

As regards the general duties of attachés, the regulations continue: "The senior will, in the Chancery, occupy the position which a senior clerk occupies in the Foreign Office. He will be responsible for the correct performance of the details of the Chancery work; he will assign to the other attachés their respective portions of it; he will have the general custody of the cyphers and the decyphers, and he will be responsible for keeping the accounts of the extraordinary expenditure, and for submitting them to the chief of the embassy or mission for approval and transmission to England, as soon as possible after the expiration of each quarter. Moreover, as stated in the circular of 10th February last, the senior attaché for the time being will, if no other person has, with the sanction of the Secretary of State, have the custody of the archives. He will be held responsible for their being kept in proper order; for the correspondence being regularly registered; and for the letters and drafts being properly docketed and filled up before they are consigned to the archives."

The position and duties of keeper of archives in those embassies or missions to which such an officer is attached, correspond with those of the librarian at the Foreign Office, "though his duties in regard to the correspondence will commence at an earlier period than those of that officer. Those duties will be to keep the papers, whether bound or unbound, in good order, so that they may at any time be easily accessible; to see that the papers are at stated intervals bound in volumes; and to make references and memoranda, for the information of the ambassador or minister, and for the general requirements of the Chancery" (*q.v.*).

The order of precedence among the junior members of Her Majesty's Diplomatic Service are: Secretary of embassy or legation, paid attachés, unpaid attachés, keeper of archives, and translator, where a translator is appointed with the sanction of the Secretary of State (Circular to the Heads of Missions, dated Nov. 6, 1860; in force January 1897).

The Secretary of State for Foreign Affairs reserves the power to recommend to the Queen the name of any person, though not in the Diplomatic Service, for the higher and more responsible posts in it.

The duration of appointments of heads of missions at foreign courts may not exceed, though it may be less than, five years; at the end of which period reappointment becomes a question for consideration (see *Foreign Office List*, 1897, p. 246).

Members of the Diplomatic Service, on attaining the age of seventy

years, are retired on the pension for which their services may qualify them.

All the members of the Diplomatic Service are expected to take their turn in whatever part of the world their services may be required; and, except as regards Teheran and Peking, where no accommodation can be procured for married men, every secretary or attaché, whether married or unmarried, must be prepared to go to the post at which the requirements of the public service demand his presence, and to which he may be appointed (Regulations for H.M.'s Diplomatic Service, xiii.).

The privileges and immunities granted to diplomatic agents by the foreign States to which they are accredited are in general as follows:—Exemption from trial for a criminal offence by the Courts of the countries to which they are accredited; immunity (except in very extreme cases) from arrest; freedom from taxation (except local rates; unless, as regards England, exemption is specially provided for in the Local Act (see *Parkinson v. Potter*, 1886, 16 Q. B. D. 152); the right of importing articles for personal use free of custom duty; and a general, though not everywhere well-defined, immunity from civil jurisdiction. They have also the right, though seldom exercised, to refuse to appear before a law Court to give evidence.

If a diplomatic agent commits a crime, the usual procedure is to request his Government to recall him, or he may even be ordered to leave the country at once. If the crime is of exceeding gravity, he may be provisionally arrested.

The immunities enjoyed by the head of a diplomatic mission extend to the building and ground within which he dwells and carries on the work of his mission. By a fiction of international law they are regarded as a portion of the territory of the State represented by the mission. Hence the expression used to describe their legal position of extritoriality (*q.v.*).

Extritoriality as a fiction only goes the length of the purposes for which it exists. Thus it cannot be claimed as a right of asylum (*q.v.*) to ordinary criminals.

The privileges of diplomatic agents in Great Britain are partially set out in an Act of 1708, 7 Anne, c. 12, entitled an Act for Preserving the Privileges of Ambassadors and other Public Ministers of Foreign Princes and States. The preamble to this Act, which has been held to be declaratory and in confirmation of the common law (*Novello v. Tovegood*, 1823, 1 Barn. & Cress. 562; *Hopkins v. Robeck*, 1789, 3 T. R. 80; *The Magdalena Steam Navigation Co. v. Martin*, 1860, 28 L. J. 6 Q. B. 310), states that several turbulent and disorderly persons in a most outrageous manner had insulted the person of his Excellency Andrew Artemonowitz Mattueof, ambassador extraordinary of his Czarish Majesty, Emperor of Great Russia, Her Majesty's good friend and ally, by arresting him, and taking him by violence out of his coach in the public street, and detaining him in custody for several hours, in contempt to the protection granted by Her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors and other public ministers, authorised and received as such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable. It therefore provides that all actions and suits, writs and processes, commenced, sued, or prosecuted against the said ambassador by any person or persons whatsoever, and all bail bonds given by the said ambassador, or any other person or persons on his behalf, and all recognisances of bail given or acknowledged in any such action or suit, and all proceedings upon or by pretext or colour of such action or suit, writ, or process, and all judgments had thereupon, are utterly null and

void, and shall be deemed and judged to be utterly null and void to all intents, constructions, and purposes whatsoever (s. 1); and that to prevent the like insolences for the future, all writs and processes that shall at any time thereafter be sued forth or prosecuted whereby the person of any ambassador or other public minister of any foreign prince or State authorised and received as such by Her Majesty, her heirs or successors, or the domestic or domestic servant of any such ambassador or other public minister, may be arrested and imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever (s. 3); and that in case any person or persons shall prosecute any such writ or process, such person and persons, and all attorneys and solicitors prosecuting and soliciting in such case, and all officers executing any such writ or process, being thereof convicted by the confession of the party, or by the oath of one or more credible witness or witnesses, shall be deemed violators of the laws of nations, and disturbers of the public repose, and be punished accordingly (s. 4); provided, however, that no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts who may have put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by this Act (s. 5). Thus a public minister duly accredited to the British sovereign by a foreign State is privileged from all liability to be sued here in civil actions (*The Magdalena Steam Navigation Co. v. Martin*, 1860, 28 L. J. Q. B. 310).

This applies even to a British subject accredited to Great Britain by a foreign Government as a member of its embassy. Unless he has been received by the British Government upon the express condition that he shall be subject thereto, he is exempt from the local jurisdiction of his own country, and therefore his household furniture is privileged from seizure for non-payment of parochial rates (*Macartney v. Garbutt*, 1890, 24 Q. B. D. 368).

But a person claiming the benefit of this Act as domestic servant to a public minister must be really and *bonâ fide* the servant of such minister at the time of the arrest, and must show by affidavit the nature of his service and the actual performance of it, and that he is not a trader or object of the bankrupt laws (*Evans v. Higgs*, 1727, 2 Stra. 797; 2 Raym. (Ld.) 1524; *Seacomb v. Bowlney*, 1743, 1 Wils. 20; *Malachi Carolino's case*, *ibid.* 78; *Triquet v. Bath*, 1764, 1 Bli. 471; 3 Burr. 1478; *Darling v. Atkins*, 1769, 3 Wils. 33; *Delvalle v. Plomer*, 1811, 3 Camp. 47; *Fisher v. Begrez*, 1832, 1 C. & M. 117; see also *Heathfield v. Chilton*, 1767, 4 Burr. 2016).

It is no ground against the application of the Act that the servants of a public minister are natives of the country where he resides; they are equally with his foreign servants exempt from arrest (*Lockwood v. Coysgarne*, 1765, 3 Burr. 1676; *Widmore v. Alvarez*, 1730, 2 Stra. 797; *Darling v. Atkins*, 1769, 3 Wils. 33; *Novello v. Toogood*, 1823, 1 Barn. & Cress. 562). Where, however, the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings, it was held that his goods in that house, not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates (*Novello v. Toogood*, 1823, 1 Barn. & Cress. 554).

The immunity of a foreign ambassador from local process extends for such a reasonable period after the presentation of his letters of recall as is necessary for him to wind up his official business and prepare for his return home; he is not deprived of his immunity if his successor is appointed

during that period; nor does the Limitation Act, 1623, begin to run against the creditors of an ambassador of a foreign State while he is in this country and duly accredited during the period above referred to. The provisions of Order 11 as to service of writs out of the jurisdiction does not annul the right under 4 Anne, c. 16, to bring an action on the return from beyond seas of a person against whom there is a right of action (*Musurus Bey v. Gadban*, D. C., [1894] 1 Q. B. 533; affirmed by C. A. [1894] 2 Q. B. 352).

It is a matter of propriety inherent to the very character of a diplomatic agent that he should abstain from taking any part in, and be guarded in expressing any opinion on matters of the domestic policy of the State to which he is accredited (see an examination of the case of Lord Sackville, then Sir L. S. Sackville West, in Hall's *International Law*, 1895, p. 321).

The Act of 1708 does not extend to consuls (*Vircash v. Beecher*, 1814, 3 M. & S. 284; and see *Clarke v. Cretico*, 1808, 1 Taun. 106; 1 Ch. C. L. 69, 70). See CONSUL.

*Oath before Diplomatic Agent.*—By 52 Vict. c. 10, s. 6, it is provided that every British ambassador, envoy, minister, chargé d'affaires, and secretary of embassy or legation exercising his functions in any foreign country, . . . may, in that country or place, administer any oath and take any affidavit, and also do any notarial act which any notary public can do within the United Kingdom; and every oath, affidavit, and notarial act administered, sworn, or done by or before any such person shall be as effectual as if duly administered, sworn, or done by or before any lawful authority in any part of the United Kingdom (s. 1).

Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any person authorised by this section to administer an oath in testimony of any oath, affidavit, or act being administered, taken, or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, or of the official character of that person (s. 3).

[*Authorities.*—Hall, *International Law*, 4th ed., Oxford, 1895; Calvo, *Droit International*, 5th ed., 5 vols. and Suppl., Paris, 1887–1896; Rivier, *Principes du Droit des Gens*, Paris, 1896; Bluntschli, *Das Moderne Völkerrecht*, trans. Lardy, 4th ed., Paris, 1886; De Martens (F.), *Traité de Droit International*, trans. Leo, Paris, 1883–1887; Twiss, *Law of Nations in Time of Peace*, Oxford, 1884; Phillimore, *International Law*, 3rd ed., London, 1879–1885; Pradier-Fodéré, *Cours de Droit Diplomatique*, Paris, 1884; Spencer Walpole, *Foreign Relations*, London, 1882; Duclercq and Vallat, *Formulaire des Chancelleries Diplomatiques*, 5th ed., Paris, 1880; Woolsey, *Introduction to International Law*, 5th ed., London, 1879; Klüber, *Droit des Gens*, new ed., Paris, 1874; Heffter, *Droit International Public*, trans. Bergson, 3rd ed., Paris, 1873; Pasquale Fiore, *Nouveau Droit International Public*, trans. Pradier-Fodéré, Paris, 1869; De Martens (Ch.), *Guide Diplomatique*, 5th ed., Geffcken, 1876.] See EXCELLENCY.

**Direction in Writing.**—Where a broker wrote to his client, "I enclose a contract note for £300 J. bonds at 112, £336," and the client wrote in reply, "I have just received your note and contract note for three J. shares, and enclose a cheque for £336 in payment," it was held that this letter from the client constituted a "direction in writing" within sec. 75 of the Larceny Act, 1861, which makes it a misdemeanour for a person who has been intrusted as a banker, merchant, broker, attorney, or other agent

with any money or security for the payment of money with a direction in writing to apply same in a particular way, to misapply same (*R. v. Christian*, 1873, L. R. 2 C. C. R. 94). In *R. v. Brownlow*, 1878, 39 L. T. 479, it was held that a letter from the prosecutors to the prisoner, who was in their employment as a commission agent, directing him to remit to them all moneys as soon as received by him from customers, was not a "direction in writing" within the section. [See Archbold, *Criminal Law*, 21st ed., 527-530.]

**Directions, Summons for.**—The history of the summons for directions is that of a cautiously developed policy on the part of the judges of the Queen's Bench Division, designed to cheapen and expedite procedure by establishing judicial control over the interlocutory proceedings in an action commenced by writ. The first step in this direction was taken in 1883, when a new Order (Order 30, R. S. C. 1883), consisting of three rules under the title "Summons for Directions," was included in the new code of Rules of the Supreme Court issued in that year. The immediate intention of that Order was merely to substitute one general summons, covering all ordinary interlocutory applications, for the number of separate summonses previously required for all applications in chambers. This intention was never realised. The Order in question empowered any party to apply at any time for directions as to the future course of the action, and provided that the costs of separate summonses should be disallowed where a general summons might have been issued. It was, however, a failure, for it quickly fell into disuse, or, at any rate, was used with comparative rarity during the ten years it remained in force.

In 1893 a new and more stringent Order, 30, was substituted for the original Order. Power was given to the master in chambers on hearing a summons for directions to order trial with or without pleadings, to fix the place and mode of trial, to specify precisely what discovery, if any, should be given, and in fact to give both negative and positive directions as to the course of the action. By the same rules (R. S. C., Nov. 1893) an important addition was made to Order 14, namely, rule 8, which empowered the master in giving leave to defend to include in his order any directions which could be given under the accompanying new Order 30 (Summons for Directions), and to order the action to be inserted in a special list for trial forthwith.

It is to this addition to Order 14 that the policy underlying the gradual changes in the rules as to the summons for directions owes its most recent and striking development.

Order 30 of 1893 still left the parties the option of applying it to their actions, or of proceeding without bringing its stringent provisions into play. This option was generally exercised against any application for directions, and consequently the order still remained a failure. Under Order 14, r. 8, which gave the Court power to make an order for directions when giving leave to defend, a great number of actions which would otherwise have been tried with pleadings were tried as SHORT CAUSES without pleadings. The success which attended this summary method of trying cases without pleadings disclosed the real cause of the failure of Order 30 (Summons for Directions). So long as it remained optional it was a failure. Where it partook of the nature of compulsion by the Court, it was a conspicuous success.

By the Rules of the Supreme Court, May 1897, therefore, the issue of a

summons for directions is made compulsory in all actions in the High Court commenced by writ of summons, except Admiralty actions, and except where proceedings are taken under Order 14 or the action is brought under Order 18 A (Trial without Pleadings), both of which classes of cases are separately dealt with in manner described below. The new Order 30, r. 1, of May 1897, does not confer any power on the Court beyond that which it already possessed under the repealed rule of 1893. The only material difference between the two is the compulsory provision contained in the rule of 1897.

The form of order for directions prescribed by Order 30, r. 2, is something more than a mere form. The blank spaces are filled in with specimen directions given in an imaginary case, and these specimens indicate clearly the intention of the Court to exercise a comprehensive and discretionary control over every step in the proceedings down to and including trial. Although this form contains a complete set of directions for an imaginary action, there is clearly no intention to imply that they should be given on the first application, for Order 30, r. 6, makes provision for the gradual completion of the order for directions by successive applications under the same summons, on two clear days' notice to the other side of every application subsequent to the first.

In framing Order 30, r. 1, of 1897, care has evidently been taken to interfere as little as possible with previously existing procedure for obtaining summary judgment either by default, or by application under Order 14, or after summary trial under Order 18 A.

As regards judgments in default, those under Order 13 (Default of Appearance) are left untouched, as the summons for directions can only issue after appearance has been entered (Order 30, r. 1 (b)). The procedure to judgment in default of defence, on the other hand, is completely altered by Order 30, r. 1, which provides that after appearance the plaintiff shall issue the summons for directions before taking any fresh step in the action. He is therefore debarred from entering judgment in default of defence until after he has obtained the order for directions, and his right to enter judgment in default of defence depends upon whether or not delivery of defence is one of the directions given. If defence is ordered and the defendant fails to comply with such order, the plaintiff will thereupon become entitled to proceed in default of defence under Order 27.

The application of Order 30 to actions by specially indorsed writ coming under Order 14, is suspended from the issue of the summons under Order 14 until the termination of the proceedings under the last-named Order. Order 30 does not provide that in cases coming under Order 14 there shall be no summons for directions, but merely that after appearance a summons for directions must be taken out prior to any further proceeding other than an application under Order 14, or for an injunction or a receiver. The intention of the rule on this point is clear. There being power under Order 14, r. 8, in giving leave to defend, to make an order for directions under Order 30, there is no necessity to insist upon a summons for directions, unless and until the action passes through the summary procedure under Order 14, and still remains a pending action without directions having been given. Such an occurrence is extremely improbable, but as it is within the bounds of possibility the application of Order 30 to such a case is retained in case of need.

By Order 30, r. 1 (d), cases coming within Order 18 A (Trial without Pleadings) are excepted from the operation of the Order, and a special provision is added (Order 30, r. 1 (e)), empowering the Court on the hearing

of an application for pleadings by a defendant, under Order 18 A, to deal with such application as if in all respects it were a summons for directions under Order 30. The effect of this provision will be to give much greater elasticity to procedure under Order 18 A (Trial without Pleadings), by enabling the Court to modify its stringency without removing actions entirely from its operation.

**Directly Affected.**—Order 58, r. 2 (R. S. C.), requires that in appeals to the Court of Appeal notice of appeal must be served upon all parties “directly affected” by the appeal. A third party, who has been served by a defendant, and has obtained leave to appear at the trial, is not a person “directly affected” by an appeal by the plaintiff within the meaning of the rule (*In re Salmon, Priest v. Uppleby*, 1889, 42 Ch. D. 351). It appears to be doubtful whether an official receiver is a person “directly affected” by an appeal against a receiving order, but the Court of Appeal decided in *In re Webber, Ex parte Webber*, 1889, 24 Q. B. D. 313, that a notice of appeal must be served on him in such a case; so also must notice be served on the trustee in bankruptcy as well as on the petitioning creditor in appealing from the refusal to annul an adjudication of bankruptcy (*In re Ward, Ex parte Ward*, 1880, 15 Ch. D. 292).

**Director of Public Prosecutions.**—Prior to 1879 there was no effective or systematic arrangement for the prosecution of offences in England such as exists in Scotland and most continental States; and except where the Attorney-General intervened in a case which was regarded as of general concern, the initiation of prosecutions was left to private enterprise, encouraged only by the provisions for defraying the costs of prosecuting certain offences out of some local rate or fund.

By the Prosecution of Offences Acts, 1879 (42 & 43 Vict. c. 22) and 1884 (47 & 48 Vict. c. 58), steps were taken to provide somewhat more adequately for a national and public system of prosecution. The scheme of the Act of 1879 was to create a new department of Director of Public Prosecutions distinct from the existing legal departments of the Crown; but this arrangement was found wasteful and ineffective, and in 1884 the department was merged in that of Solicitor to the Treasury, who, with his assistant solicitor, now acts as Director of Public Prosecutions (47 & 48 Vict. c. 58, s. 2), subject on all matters, including the selection and instruction of counsel, to the directions of the Attorney-General (Regulations, 1886, No. 2, s. 10).

In discharge of this office it is his duty under the supervision of the Attorney-General (1) to institute, undertake, or carry on criminal proceedings at any stage and in any Court; (2) to give advice and assistance to persons, whether officials or not, concerned in a criminal proceeding as to its conduct. The cases in which he is to act thus are those prescribed by regulations under the Act or specially directed by the Attorney-General. The regulations may be made (1) generally for carrying the Acts into effect; (2) providing for undertaking cases of importance and difficulty, or in which, owing to special circumstances or the refusal or failure to proceed with a prosecution, intervention on the public behalf is necessary for the due prosecution of the offender; (3) for fixing the districts for which the assistants of the director are to be appointed and act (42 & 43 Vict. c. 22, s. 2); and (4) for prescribing the forms and particulars to be used and

specified in police returns as to crimes (1879, ss. 2, 6; 1884, s. 3). The regulations are to be made by the Attorney-General, with the approval of the Lord Chancellor and a Secretary of State, and when made do not come into force until the draft has lain before each House of Parliament for not less than forty days on which the House has sat (1879, s. 6).

Two sets of regulations were made on January 25, 1886 (St. R. & O., Revised, vol. ii. pp. 600-604), which prescribe the duties of the public prosecutor, of chief officer of police, and coroners, justices, and their clerks.

*Duties of the Public Prosecutor.*—The public prosecutor must institute, undertake, or carry on the following criminal proceedings:—

(a) For offences punishable by death;

(b) For offences of a class the prosecution whereof was prior to January 25, 1886, undertaken by the Treasury Solicitor (*e.g.* cases under the Coinage Offences Act, 1861; Parl. Pap. 1897, C. 200, p. 4);

(c) Where he receives an order from a Secretary of State or the Attorney-General;

(d) Where it appears to him that the offence or the circumstances of its commission is or are such as to call, in the public interest, for prosecution, and that owing to its importance or difficulty or other causes due prosecution is unlikely without his intervention (s. 1).

To this list should be added prosecutions by order of the Boards of Trade or Agriculture, under the Merchandise Marks Acts, 1891 and 1894 (see Parl. Pap. 1897, C. 200, p. 25). The public prosecutor has also duties with respect to attending the trial of ELECTION PETITIONS and prosecuting for election offences (Parl. Pap. 1897, C. 200, p. 37).

The public prosecutor in such cases may take all such steps as he thinks necessary. He may also, where, on a CROWN CASE RESERVED, no counsel is instructed for the prosecution, instruct counsel if he thinks the case of sufficient importance, or is so directed by the Attorney-General (s. 4).

He may on application or on his own initiative give advice verbally, or in writing in any case which he thinks important or difficult, to justices, clerks, or chief officers of police, or other persons (s. 3), and he may assist prosecutors by authorising them to incur special costs (1) for preparing scientific evidence and remunerating scientific witnesses; (2) for preparing plans or models; (3) for paying special fees to counsel; or (4) for any special purpose sanctioned by the Attorney-General. He may also, *ex post facto*, sanction such costs where requisite, and incurred on emergency without his previous authority.

He may also employ a solicitor as his agent for a prosecution, and certify, after examining his charges, what he considers reasonable and proper to be paid (Regs. No. 2, s. 9). It is not stated out of what fund these costs are to be defrayed (but see Parl. Pap. 1897, C. 200, List A).

The public prosecutor cannot be compelled to disclose the sources of the information on which he undertakes a prosecution (*Marks v. Beyfus*, 1890, 25 Q. B. D. 494).

If the public prosecutor takes up a case, he is not bound over to prosecute or give security for costs (*e.g.* in election cases), nor need any person be so bound over; and persons bound over, or who have given security before he intervenes, are released by his intervention, and their liabilities fall upon him (Act 1879, s. 7; *Stubbs v. Director of Public Prosecutions*, 1890, 24 Q. B. D. 490); but his intervention does not affect the right of any person to obtain restitution of property, or obtain any claim, right, or



advantage by a private prosecution, if such person gives the public prosecutor all reasonable information and help in the public prosecution (1879, s. 7). This proviso applies specially to restitution under sec. 100 of the Larceny Act, 1861.

The costs of public prosecutions are, subject as above, defrayed in the same way as those of private prosecutions (see vol. iii., p. 512), and, so far as not paid out of public funds, are paid by moneys provided by Parliament on the appropriation for the Treasury Solicitor's Department.

If the public prosecutor takes up and drops a prosecution, any other person who would otherwise have been entitled to prosecute may, by showing good cause on affidavit, obtain an order from the High Court, directing the mode in which the proceedings may be continued by the applicant (Act of 1879, s. 6). This power seems not to have been exercised, nor does it appear whether the application should be by summons or motion.

It is the duty of the public prosecutor to require (Regs. No. 2, s. 6) the chief officers of police of every district (Regs. No. 1, s. 1) to give him information with respect to certain indictable offences alleged to have been committed in the district, namely:—

1. All offences punishable by death;
2. (a) Other offences which appear to the officer of such importance or difficulty as to render the assistance of the public prosecutor desirable;
- (b) Other offences where the prosecution is abandoned or not properly followed up;
- (c) Other offences in regard to which it appears to the officer under the regulations that the prosecution should be instituted, undertaken, or carried on by the public prosecutor; and
- (d) Other offences where the information is required of him in writing by the public prosecutor.

Special provision is also made as to the times and modes of giving the information as to capital or non-capital offences.

It is the duty of the public prosecutor to give notice to a justice or coroner when he has instituted or undertaken or is carrying on a criminal proceeding (Regs. No. 2, s. 7), and it is the duty of the person receiving the notice (subject to any special direction by the Attorney-General), within three days of its receipt, to transmit to the public prosecutor, by registered letter or by railway or messenger, every recognisance, information, certificate, requisition, deposition, document, and thing connected with the case which he would otherwise have by law to deliver to the proper officer of the Court of trial (1879, s. 5; Regs. No. 1, s. 5). Failure to comply with this obligation exposes the justice or coroner to a liability to be fixed by the Court of trial (Act of 1879, s. 5; 7 Geo. iv. c. 64, ss. 5, 6).

The public prosecutor on receipt of the documents, &c., is under the same obligation as the coroner or justice or officer of the Court of trial as to giving copies (11 & 12 Vict. c. 42, s. 27; 30 & 31 Vict. c. 35, s. 4; 42 & 43 Vict. c. 22, s. 5), and must, at a reasonable time before the trial, cause the originals to be delivered or sent by registered letter to the proper officer of the Court of trial (Act of 1879, s. 5; Regs. No. 1, s. 5; No. 2, s. 7).

Where a prosecution for any offence (whether indictable or not) instituted before a Court of summary jurisdiction is withdrawn or is not proceeded with within a reasonable time, the clerk of the Court must send to the public prosecutor a letter stating the circumstances of the case, and inquiring whether he wishes a copy of the information and depositions or documents connected with the case; and if he does, to deliver or send by registered letter such documents as the public prosecutor requires (1879, s.

5; Regs. No. 1, s. 6; No. 2, s. 8). The effect of this last provision is to prevent magistrates from readily assenting to the withdrawal of a warrant or prosecution, and to enable the public prosecutor to investigate cases where criminal proceedings are compromised in a manner inconsistent with public justice.

The Treasury Solicitor has made, since 1886, an annual return on the proceedings and expenses of his department in public prosecutions. That of 1897 forms Parl. Pap. 1897, C. 200; and the prior returns are enumerated on p. 3 of the 1897 return.

### **Directory.**—See COPYRIGHT.

**Directory Enactment.**—When a statute is passed for the purpose of enabling something to be done, and prescribes the way in which it is to be done, it may be either an absolute enactment or a directory enactment. The difference between the two is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

It seems that no universal rule can be laid down as to whether enactments shall be considered directory only or obligatory, but it is the duty of the Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed (see *Liverpool Bank v. Turner*, 1861, 30 L. J. Ch. 380).

In the case of the *R. v. Lofthouse* (1866, L. R. 1 Q. B. 443), it was held that under the Act 11 & 12 Vict. c. 63, s. 24, it was the duty of the chairman at an election of a local board of health to fill up the voting papers with the number of votes, but that the requirement of the statute was not obligatory, and the omission did not vitiate them and render the election void, and that the chairman would be liable to the penalty imposed by the Act.

[*Authorities.*—See Hardcastle on *Statutes*, 2nd ed., 1892; Maxwell on *The Interpretation of Statutes*, 3rd ed.]

**Disabling Statutes.**—A disabling or restraining statute is one which restricts the rights of persons. For instance, at common law spiritual corporations might lease out their estates for any term of years. The Statute 13 Eliz. c. 10 prevented them from making leases for longer terms than twenty-one years. It would therefore be described as a disabling or restraining statute.

On the other hand, the Statute 32 Hen. VIII. c. 28, which gave certain ecclesiastical corporations a more ample power of making leases than they possessed before, is called an enabling statute.

[*Authorities.*—See Stephen's *Commentaries*, 11th ed.; Hardcastle on *Statutes*, 2nd ed., 1892; Maxwell, *Interpretation of Statutes*, 1896.]

**Disafforest.**—Cp. Magna Carta, 47, "*Omnes forestæ quæ afforestatæ sunt tempore nostro, statim disafforestentur*," and the Charta de Foresta of Henry III., ap. Stubbs' *Select Charters* (Clarendon Press), p. 348. To disafforest is to deprive of the franchise or royal privilege of FOREST (*q.v.*). The extensive afforestations or creations of new forests constituted one of

the most serious grievances of the subject under the Norman kings. The grievance lay in the fact that the forest was a privileged royal area, an *imperium in imperio*, subject exclusively to the oppressive and cruel forest law, and the importance of a disafforesting charter consisted in the restoration of the common law of the land. Disafforested lands remained in mediæval times subject to certain forestal rights of the Crown, and were known as purlieus (apparently from *pourallée*, an area ascertained by *perambulatio*, Manwood, *Forest Laws*, c. 20, ss. 1-4). In modern practice disafforesting is effected by Act of Parliament. Cp. the Whichwood Disafforesting Act, 16 & 17 Vict. c. 36, whereby it is provided that the boundaries shall first be ascertained, and that the forest shall thereupon be disafforested, and all right of Her Majesty to "herbage and feed for deer" and all other forestal rights shall cease.

**Disbursement.**—A liability incurred by the master of a ship for necessities is a "disbursement" within the meaning of sec. 10 of the Admiralty Court Act, 1861 (*The Fairport*, 1882, 8 P. D. 48), but that statute does not give him a maritime lien in respect of such disbursement (*The Sara*, 1889, 14 App. Cas. 209).

A payment for probate duty, made by a solicitor on behalf of his client, is a "disbursement" within the meaning of sec. 37 of the Solicitors Act, 1843, and is properly included in his bill of costs (*In re Lamb*, 1889, 23 Q. B. D. 5). Only such payments as are made by the solicitor as such are properly to be included in his bill of costs as "disbursements" (*In re Remnant*, 1849, 11 Beav. 603).

**Discharge of Prisoners.**—The term discharge, as applied to persons under restraint, means their release in accordance with law from the custody or charge in which they are, whether they are in charge on an accusation or conviction of crime, including contempt of Court, or as debtors, or in respect of other civil liability. When the release from custody is not in accordance with law, if effected by the voluntary act of the public custodian, it is an ESCAPE (*Mirror of Justice*, ed. 1873, 7 Seld. Soc. Pub. 52); if by friends of the prisoner, it is a RESCUE; if by the prisoner, it is PRISON BREACH (1221, 1 Seld. Soc. Pub. pl. 155; 1270, *ibid.*, pl. b, 199, 201). Where the custody is not legal, the prisoner is entitled to free himself by force if he can. Failing this, his discharge is ordinarily obtained by writ of HABEAS CORPUS; and whether released or not, he is entitled to sue his custodian for FALSE IMPRISONMENT, subject to any defence to which the latter is entitled *virtute officii*.

Where the prisoner is legally in the custody or charge of another, he may be discharged only (1) by the order of a Court of justice; (2) on the removal of the legal ground for his imprisonment, *e.g.* on acquittal; (3) on the expiration of the period for which he is directed by a Court to be imprisoned or detained; (4) on satisfaction of the conditions, if any, imposed by the order of a Court as conditions precedent to his release.

(1), (2) When a prisoner is indicted for treason or felony and pleads not guilty, on issue joined he is given in charge to the jury, and upon their verdict depends his right to discharge. If they do not agree, and are discharged, he returns to the custody of his gaolers, unless the Court otherwise orders.

When a prisoner who is charged with an indictable offence is acquitted,

or the bills sent up against him are ignored, or is discharged for want of prosecution, he is entitled to immediate release from custody without payment of any fee to a sheriff or the gaoler of the prison from which he is discharged (55 Geo. III. c. 50, s. 4; 8 & 9 Vict. c. 114, s. 1). The same rule is applicable to persons charged before a Court of summary jurisdiction if the charge is dismissed, withdrawn, or abandoned.

(3) A person who is in custody in execution of legal sentence, must be detained until the period specified in the judgment or the commitment in execution has expired, or if it ends on a Sunday, then on the preceding Saturday (28 & 29 Vict. c. 126, s. 41).

Before a prisoner is discharged, he must be examined by the prison doctor; and he may not be discharged if labouring under any acute or dangerous ailment, nor until the doctor certifies that he can safely be discharged, unless, of course, the prisoner demands to be discharged (28 & 29 Vict. c. 126, s. 16).

Before discharging a convicted prisoner under sixteen, the governor of the prison must inform the friends and relatives when and where he will be discharged, unless they are known to be bringing him up in evil courses, and some other respectable person approved by the visiting justices is willing to take care of him, and the prisoner consents (Prison Rules, 1878, r. 11; St. R. & Q., Rev., vol. v. p. 659).

On the discharge of any prisoner, the Prison Commissioners may, on the recommendation of the visiting justices, allow him a sum not exceeding £2, to be paid to him or a prisoners' aid society or refuge (certified under 24 & 25 Vict. c. 44, s. 1), to be applied for his benefit (40 & 41 Vict. c. 21, s. 29); and the visiting justices may out of any moneys under their control, as applicable to paying the expenses of the prisoner, supply him with the means of returning to his home or place of settlement, by causing his railway fare to be paid or otherwise (28 & 29 Vict. c. 125, s. 43).

(4) As to discharge of prisoners on bail, see BAIL.

On conviction, whether of an indictable offence or an offence punishable summarily, the Court may order the discharge of the offender without punishment, conditionally on his entering into a recognisance, or finding security with or without sureties to appear for sentence when called upon, or to be of good behaviour (42 & 43 Vict. c. 49, s. 16). In such case, the custodian may not release the prisoner until the condition is satisfied.

A gaoler who voluntarily releases a prisoner before the lawful time is liable for an escape (*Mirror of Justices*, ed. 1893, 7 Seld. Soc. Pub. p. 152). The sheriff is no longer liable as to prisoners in a prison (40 & 41 Vict. c. 21, s. 31). If the prisoner is detained beyond the legal time, the gaoler is liable to an action of FALSE IMPRISONMENT.

**Discipline (Ecclesiastical).**—Church discipline is enforced by means either of the common law ecclesiastical of England, or through the provisions of the various statutory enactments which have been passed to give greater efficiency to the common law. This common law ecclesiastical may be described as derived from the constitutions of the synods and councils in England before the authority of the pope was acknowledged here, such part of the Roman canon law as is not at variance with the common or statute law of the realm or with the royal prerogative, and certain unwritten moral principles established and legalised by long usage.

As to the Ecclesiastical Courts which administer the law ecclesiastical and enforce the discipline of the Church, see note on ECCLESIASTICAL COURTS.

Offences against morality on the part of the clergy are now dealt with under the Clergy Discipline Act of 1892 (55 & 56 Vict. c. 32), which superseded for that purpose the earlier Act of 1840 (3 & 4 Vict. c. 86). The last-named Act was passed in consequence of a recommendation, by the Ecclesiastical Courts Commission of 1830–32, of special legislation with a view to the more effectual prosecution of criminal suits against immoral clergy. It provided a more effective machinery for dealing with all clergy offending against the laws ecclesiastical, or by those concerning whom there might exist scandal or evil report as having offended against the said laws. The scope of the Act of 1840 was perfectly general, though its operation has been recently curtailed by the passing of the Clergy Discipline Act of 1892.

The procedure of the Act of 1840 may be briefly described as follows:— Upon complaint made to him by anyone that a clergyman has committed an offence against the laws ecclesiastical in his diocese, the bishop may (if in his absolute discretion he thinks fit to do so) issue a commission to five persons to inquire into the truth of the charge. If the commissioners, after hearing the evidence in public (or in private, if so desired by the accused), report to the bishop that there is a *prima facie* case, the bishop of the diocese in which the accused holds preferment, accompanied by three assessors, tries the accused by *viva voce* evidence, and pronounces sentence. There is an appeal from the Bishop's Court to the Court of the Province, and thence to the Judicial Committee of the Privy Council. Instead, however, of trying the accused himself, the bishop, with or without issuing any commission, may send the case, by letters of request, to be tried by the Court of the province, and, as this course saves the expense of an appeal from the bishop, it has been commonly adopted, with the result that the personal jurisdiction of the bishop has not in practice been restored, as was certainly the intention of the Legislature in passing this Act. It was decided, however, in 1880, by the House of Lords, that the words "it shall be lawful for the bishop . . . on the application of any party complaining . . . to issue a commission" in the second section, give the bishop a complete discretion to permit or to veto, as he chooses, the commencement of proceedings against an accused clergyman (*Julius v. Bishop of Oxford*, 1880, 5 App. Cas. 214); but if he allows the proceedings to once begin by issuing a commission, he cannot then stop them in the teeth of the finding of the commissioners that there is a *prima facie* case (*R. v. Archbishop of Canterbury*, 1856, 6 El. & Bl. 546; *Sheppard v. Phillimore*, 1877, L. R. 2 P. C. 460). All proceedings under this Act must be taken within two years of the commission of the offence charged, unless the accused has been convicted in a Court of common law; in which case the proceedings in the Ecclesiastical Court may take place at any time within six months of the conviction. The punishment inflicted by the Court of the bishop or of the province may be, according to the gravity of the offence, ecclesiastical censures, such as monition, suspension, or deprivation.

The Clergy Discipline Act of 1892 (55 & 56 Vict. c. 32) does not deal with offences connected with doctrine or ritual, which must be proceeded against either under the Church Discipline Act of 1840, or under the Public Worship Regulation Act of 1874, presently to be mentioned. The Act of 1892 is directed solely against immoral acts or immoral conduct on the part of the clergy, and in regard to offences of such a nature,—but no further,—the Act of 1840 has been repealed and its provisions material thereto have ceased to be operative.

It is a question of some difficulty what exactly comes under the head of

immoral conduct, and in a quite recent case which went to the Privy Council (*Beneficed Clerk v. Lee*, [1897] App. Cas. 226) the Judicial Committee had to decide whether simony was an offence against morality so as to be cognisable under the Act. It was held not to be such an offence. Their Lordships construed the words "immoral acts" as meaning "acts which in the consensus of general opinion are acts of personal immorality, such as various forms of vice or dishonesty or other like conduct, of evil example generally, and especially so if committed by a person invested with sacred functions"; and they came to the conclusion that in order to punish simony in a clerk, proceedings ought to be taken, not under the Act of 1892, but under the Act of 1840.

Under the Act of 1892 the Consistory Court, *i.e.* the Court of the Diocesan Chancellor, is made the sole Court of first instance for the trial of offences coming within the purview of the Act. The chancellor sits, attended by five assessors. The case, if not vetoed by the bishop, comes at once, without the intervention of any commission, before the Consistory Court by a complaint made through the diocesan registrar to the bishop, or on the initiative of the bishop himself, and at the hearing the chancellor decides all questions of law, questions of fact being decided by the chancellor and a majority of the assessors. The complaint may come from a parishioner or any other person approved by the bishop. Sentence of deprivation or any lesser sentence may be passed by the chancellor in every case of guilt, and a sentence of deposition from holy orders by the bishop himself may follow, though in that case the defendant is allowed an appeal to the archbishop. As to appeals, see CONSISTORY COURT.

It is further to be observed that under this Act of 1892 beneficed clergy become summarily deprived of their preferments if they have been convicted of treason, felony, or an indictable misdemeanour followed by a sentence of imprisonment with hard labour, or if they have had a bastardy order made against them, or been found guilty of adultery in a divorce suit, or had a separation order made against them under the Matrimonial Causes Act of 1878. Within twenty-one days of such conviction, order, or finding becoming conclusive, the accused's benefice is declared vacant by the bishop, and he becomes—in the absence of a free pardon, or the special permission of both his bishop and archbishop—incapable of holding any preferment. If he has been convicted of some other or lesser offence against the laws ecclesiastical than any of the above-named matters, he must be tried in the Consistory Court by the chancellor with five assessors, and he may be tried on such an issue by the chancellor alone, if the accuser and accused desire it.

It will thus be seen that the procedure under the Act of 1892 is far more simple and rapid than that under the Act of 1840, but under neither Act can complaints to the bishop be followed by a criminal suit without the consent of the bishop. On this point the case already referred to of *Julius v. The Bishop of Oxford*, 1880, 5 App. Cas. 214, is decisive as to the Act of 1840; and by the 2nd section of the Act of 1892, "if the complaint made against the clergyman appears to the bishop of the diocese to be too vague or frivolous to justify proceedings, he shall disallow the prosecution." By the 5th section of the same Act a complaint against a clergyman must be made within five years of the act complained of.

The Public Worship Regulation Act of 1874 (37 & 38 Vict. c. 85) provides an alternative system of procedure to the Act of 1840 for punishing cases of ritualistic and ceremonial offences. Any three parishioners (who must be members of the Church of England), or a churchwarden of

the parish, or the archdeacon may complain to the bishop of the commission of offences under the Act. The bishop may disregard the representation so made if he chooses,—in which case he must give his reasons in writing,—but if he permits proceedings to be taken, the trial takes place before the PROVINCIAL COURT, which may pronounce judgment, and from which there is an appeal to the Privy Council. It was decided in the case of *Allcroft v. Bishop of London*, [1891] App. Cas. 666, that when a bishop has given his reasons for not permitting proceedings to be taken under this Act, those reasons cannot be reviewed by any other Court. The class of possible complainants, it will be noted, is not so wide under this Act as it is under the Act of 1840, which allows anyone to make a complaint to the bishop, or as under the Act of 1892, which gives the same right either to any parishioner of the accused clergyman, or to anyone approved by the bishop. In questions relating to the fabric of the church this Act is wide enough in its terms to be applicable to the laity as well as to the clergy. In no case need the proceedings pass out of the bishop's own hands, if the accused and accuser express themselves willing to submit the issue to the directions of the bishop, questions of law in such an event being submitted by special case to the Court of the Province. Analogous provision is made under the Acts both of 1840 and 1892 for the accused, if he and the complainant so desire, being dealt with under the personal jurisdiction of the bishop (see s. 6 of Act of 1840 and rr. 7, 8, 9 of Act of 1892).

The personal jurisdiction of the bishops over their clergy, jurisdiction, that is, exercised out of Court and without prescribed forms, has been recognised and extended by other statutes. By the Pluralities Act, 1 & 2 Vict. c. 106 (amended by 48 & 49 Vict. c. 54), power is given to bishops in certain cases (*e.g.* the non-residence of or the inadequate performance of their duties by incumbents) to order in a summary way the appointment and the removal of curates, and the sequestration of benefices, subject, however, to an appeal to the archbishop (see ss. 75, 76, 77, 95, 96, 97, and 98). Such appeals are heard by the archbishop personally, usually with the assistance of his vicar-general as assessor. The bishop, and therefore also the archbishop, acts judicially in exercising the powers conferred by this Act (see *Bonaker v. Evans*, 1851, 16 Q. B. 178). By the same Act a penalty may be imposed upon a clergyman for non-residence (without licence) for over three months, amounting to one-third of the annual value of the benefice; for over six months' non-residence, to one-half; for over eight months', to two-thirds; and for more than that, to three-fourths. These penalties must be recovered in the Bishop's Court. Proceedings to compel residence are begun by the bishop issuing a monition to the absent clerk. Then if after being heard (which need not be a formal hearing, see *Bartlett v. Kirkwood*, 1845, 2 El. & Bl. 771) the clerk disobeys the monition, the bishop may punish the disobedient clerk by the sequestration of the benefice.

The bishop may punish offences against the provisions, contained in this Act (ss. 28–31), against the occupation by a clergyman of more than 80 acres of land without licence from the bishop, or the carrying on of trade or commerce by a clergyman, by suspension for a year for the first offence. Disobedience to the provisions in the same Act as to holding more than two benefices together carries *ipso facto* the vacation of the preferment or benefice then held by the offender. An archdeacon and a suffragan bishop (see vol. ii. p. 159) are, however, excepted (see vol. i. p. 315).

If a bishop's order for repair of dilapidations (*q.v.*) be not obeyed by the incumbent within eighteen months, the bishop may raise the sum required

by sequestrating the profits of the benefice. Lay as well as spiritual rectors may be punished by ecclesiastical censures for neglecting to do the necessary repairs to their churches (see *Morley v. Leacroft*, [1896] Prob. 92).

Simoniacal contracts (see SIMONY) have been made statutory offences under the 31st of Eliz. c. 6, and the 13th of Anne, c. 11, but these statutes do not deprive the Ecclesiastical Courts of their jurisdiction in simoniacal offences. By the canon law, to which the clergy are still subject, deprivation was the punishment for a corrupt presentation, the patron losing the patronage and the clerk the benefice. Under the statute of Elizabeth the person who so corruptly presents forfeits double of one year's value of the benefice, and the person corruptly presented becomes thenceforth disabled in law from ever holding that benefice. Resignations of benefices procured or made for corrupt reasons are similarly punished, and the corrupt procuring of ordination involves a fine of £40 for the procurer, and of £10 for the person corruptly ordained, the latter becoming for seven years incapable of accepting or holding any ecclesiastical preferment. Under both Acts the statutory penalties are in addition to, and not in substitution of, the ecclesiastical punishments or censures liable to be inflicted as the result of criminal proceedings in the spiritual Courts.

A declaration under 28 & 29 Vict. c. 122, as to preferment not having been simoniacal (see SIMONY), if falsely made is not an immoral act punishable under the Clergy Discipline Act of 1892 (*Beneficed Clerk v. Lee*, [1897] App. Cas. 226), but it would be an offence against the general law cognisable in the Ecclesiastical Courts.

BLASPHEMY (*q.v.*) is an offence under the common law, by statute, and against the laws ecclesiastical (see 29 Car. II. c. 9; 9 & 10 Will. III. c. 35; 53 Geo. III. c. 160, s. 2). The Ecclesiastical Courts may inflict excommunication, deprivation, degradation, and other ecclesiastical censures, but see vol. ii. pp. 172 *et seq.* It is not so with heresy, which is an offence cognisable only in the Ecclesiastical Courts, and there have been many cases tried of late years in those Courts in which clergymen have been the defendants. Against the laity all such jurisdiction may be considered obsolete. See vol. ii. p. 174, and see HERESY, and the following cases—*Hodgson v. Oakley*, 1 Rob. Eccl. 322 (licence revoked, and inhibition from performing any ministerial duty whatever within the province of Canterbury until retraction); *Heath v. Burder*, 15 Moo. P. C. 1 (the proceedings ending in deprivation of living); and *Noble v. Voysey*, 1877, L. R. 3 P. C. 357. In several other well-known cases the prosecution has failed to establish the charges; see, for instance, *Williams v. Bishop of Salisbury*, 1865, 2 Moo. P. C. (N. S.) 375, in which the proceedings were taken under the Church Discipline Act of 1840.

Offences against the Act of Uniformity (see UNIFORMITY, ACTS OF) (13 & 14 Car. II. c. 4) and the statutes amending it are, though possibly indictable, properly punishable in the Ecclesiastical Courts. Many of such offences are provided for by the provisions of the Public Worship Regulation Act of 1874, but where any particular offence of this nature is not met by the terms of any such statute, it may be dealt with by the Ecclesiastical Courts as an offence against the common ecclesiastical law, *e.g.* where a clergyman shuts up one of two churches in a parish, and contumaciously disobeys the order of his bishop to perform divine service in it (*Rugg v. Bishop of Winchester*, 1866, L. R. 2 P. C. 223).

No mention has so far been made of how the Church exercises discipline over bishops. The law may now be taken as settled that suffragan bishops



can be made amenable for offences against the ecclesiastical law in the Court of the archbishop of their province. This archiepiscopal jurisdiction was established successfully before the Court of Delegates—the then highest ecclesiastical Court of Appeal—as long ago as the year 1700, in the case of *Lucy v. Bishop of St. David's*, and afterwards in *Read v. Bishop of Lincoln*, 1888, L. R. 13 P. D. 221. See ARCHBISHOP; DE CONTUMACE CAPIENDO.

**Disclaimer.**—The term *disclaimer* has four principal applications in different branches of the law, namely: in the law of trusts; in the law of patents; in the law of landlord and tenant; and in the law of bankruptcy.

In the law of trusts the term refers to the refusal to undertake the office or duties of a trustee.

In the law of patents the term refers to the renunciation, by amendment of the specification, of a portion of an inventor's claim to protection (46 & 47 Vict. c. 57, ss. 18–21).

In the law of landlord and tenant the term refers to the repudiation of that relation by some act on the part of a tenant, whether he hold yearly, quarterly, monthly, or weekly, which in law has that effect.

In the law of bankruptcy the term refers to the surrender by the trustee of property belonging to a bankrupt, which is of an onerous character (46 & 47 Vict. c. 52, s. 55).

Of the two first nothing need be said in this place, as they will be found dealt with *s.v.* TRUSTS and PATENTS respectively. With regard to the two last, however, some observations are here appended.

1. Every tenancy of one of the kinds just mentioned which, instead of being made to enure for a fixed term, repeats itself from period to period, is capable of being determined by a notice to quit, and no such tenancy can in general be determined without one (see NOTICE TO QUIT). The true operation of a disclaimer is, by a kind of estoppel, to prevent a tenant who has repudiated his position as tenant, from setting up, in answer to an ejectment, the defence that he has not received proper notice to quit (*Doe v. Wells*, 1839, 10 Ad. & E. 427). The landlord, of course, must not have done any subsequent act recognising the existence of the relation of landlord and tenant, otherwise the disclaimer will be waived (*Doe v. Williams*, 1835, 7 Car. & P. 322). It is sometimes a little difficult to distinguish between a disclaimer and a surrender, but it may be stated that for a disclaimer the act relied upon must be something more than a mere renunciation of the tenant's title, and must amount to a denial of the landlord's (*Doe v. Staggy*, 1839, 5 Bing. N. C. 564). This can happen by the tenant's setting up title either in some third party or in himself. In the former case it is not very easy to extract a uniform rule from the various authorities as to what is a disclaimer and what is not. It is, however, settled that a mere refusal to pay rent until the right owner of the premises is ascertained is not sufficient (*Jones v. Mills*, 1861, 10 C. B. N. S. 788). On the other hand, an attornment to a stranger does operate as a disclaimer (*Doe v. Litherland*, 1836, 4 Ad. & E. 784). The fair meaning of the words used, if merely spoken—and writing is not necessary for a disclaimer—is for the jury (*Doe v. Long*, 1841, 9 Car. & P. 773); whilst upon that finding, or without any finding if there is no dispute as to the words, or upon the construction of the writing if there be a writing, the question is one for the decision of the Court (*Doe v. Frowd*, 1828, 4 Bing. 557).

With regard to a tenant's claim of title in himself, it must be a claim

to hold on a ground necessarily inconsistent with the continuance of the tenancy (*Doe v. Stanion*, 1836, 1 Mee. & W. 695). A tenant, as it has been held, commits a disclaimer neither by a claim to continue holding at a reduced rent (*Hunt v. Allgood*, 1861, 10 C. B. N. S. 253), nor by a demand for proof of title from the person claiming to be landlord (*Doe v. Lord Cardor*, 1834, 1 C. M. & R. 398). But a claim to the possession of the title-deeds of the demised premises seems to be sufficient (see *Doe v. Price*, 1832, 9 Bing. 356).

2. The power to disclaim property of a burdensome nature belonging to a bankrupt—a subject noticed incidentally in the article BANKRUPTCY (vol. i. p. 511)—is now regulated by sec. 55 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), amended by sec. 13 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). This section, after specifying what kinds of property it relates to, provides that the trustee, by writing signed by him, may disclaim such property at any time within three (now twelve) months after his appointment, or if the existence of the property has not come to his knowledge within a month of his appointment, within two (now twelve) months of the time he first knew of it; and this notwithstanding that he has endeavoured to sell or has taken possession of it or exercised any act of ownership in relation thereto (subs. 1). The period, moreover, of twelve months just mentioned may always be extended by the Court (53 & 54 Vict. c. 71, s. 13). The right of disclaimer is one which the trustee can enforce even as against the Crown (*In re Thomas*, 1888, 21 Q. B. D. 380).

Such disclaimer (subs. 2) operates to determine as from its date the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and also to discharge the trustee from all personal liability in respect of it as from the date when the property vested in him, but not, except so far as necessary to release the bankrupt and his property and the trustee from liability, to affect the rights or liabilities of any other person. It must be filed in Court by the trustee, as until then it is without effect (Bankruptcy Rules, 1890, r. 69). Where, for instance, a lessee assigns, and upon bankruptcy of the assignee his trustee disclaims under the Act, both the original lessee and a surety for the assignee continue to be liable, the former to the lessor and the latter to the lessee, as if there had been no disclaimer (*Hill v. East India Dock Co.*, 1884, 9 App. Cas. 448; *Harding v. Preece*, 1882, 9 Q. B. D. 281. Both these decisions, though under the Act of 1866, are applicable to the present Act).

The section further provides (subs. 7) that any person injured by the operation of a disclaimer is to be deemed a creditor of the bankrupt to the extent of the injury he has sustained, and may prove in the bankruptcy accordingly. For instance, where upon disclaimer of a lease the lessor fails to obtain the same rent as before, he may prove in the bankruptcy for the difference (*Ex parte Llynvi and Iron Co.*, 1871, L. R. 7 Ch. 28; cp. *Ex parte Blake*, 1879, 11 Ch. D. 572). Similarly, where the lessee has underlet at a lower rent than his own and afterwards becomes bankrupt, and his trustee disclaims, the under-lessee, on paying to the lessor the higher rent, which could be recovered from him by distress, is entitled to prove in the bankruptcy for the difference (*Ex parte Walton*, 1881, 17 Ch. D. 746).

Where the property in question is of a leasehold nature, and comprised, together with personal chattels, in a single demise, the trustee must disclaim all or none, and if he does disclaim, cannot claim the chattels under the reputed ownership clause (*Ex parte Allen*, 1882, 20 Ch. D. 341). He is not debarred from disclaiming by the mere fact that the lease has expired (*Ex parte Paterson*, 1879, 11 Ch. D. 908), or by the fact that the property is of

such a kind as to make it impossible that any benefit from it <sup>can</sup> accrue to the bankrupt's estate (*In re Maughan*, 1885, 14 Q. B. D. 956). But property in respect of which the trustee can incur no liability by privity either of contract or of estate is not property "burdened with onerous covenants" within the meaning of the section (*In re Gee*, 1889, 24 Q. B. D. 65). Whether the right of disclaimer applies to after-acquired leaseholds seems uncertain (*In re Clayton & Barclay's Contract*, [1895] 2 Ch. D. 212).

The section further provides (subs. 3) that a trustee shall not be entitled to disclaim a lease without leave except (Bankruptcy Rules, 1890, r. 69) where, if there has been no subletting or mortgage or charge upon the lease, the rent reserved and real value of the property are less than £20 a year, or the estate is administered as a small bankruptcy, or the lessor, upon being served by the trustee with notice of his intention to disclaim, does not within seven days require him by notice to bring the matter before the Court; and where, if there has been a subletting or a mortgage or charge upon the lease, neither the lessor nor the sub-lessee nor the mortgagees, upon being served by the trustee with notice of his intention to disclaim, require him by notice within fourteen days to bring the matter before the Court. In every other case a disclaimer without leave is void (*id.*); and as a condition of granting it the Court may impose such terms "with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy" as it thinks just (s. 55, subs. 3; see *In re Moser*, 1884, 13 Q. B. 1). 738). It has been held to follow from this provision that in cases of disclaimer without leave, the Court has no jurisdiction to give any compensation to the landlord out of the bankrupt's estate for the occupation of his premises by the trustee, even though a benefit has thereby resulted to the estate (*In re Sandwell*, 1885, 14 Q. B. D. 960). The Court in deciding whether an application for leave to disclaim should be granted, looks only to the consideration whether the bankrupt's estate would benefit thereby (*Ex parte East India Dock Co.*, 1881, 17 Ch. D. 759). If a benefit has accrued to the estate from the use of the premises, the trustee, as a general rule, will be ordered, as a condition of getting leave to disclaim, to pay the landlord rent from the date of the order of adjudication (*In re Brooke*, 1884, 1 Mor. 82); but this will not be done unless the landlord has been kept out of his property for the benefit of the creditors (*In re Zappert*, 1884, 1 Mor. 72). The trustee may always be refused leave to disclaim on special grounds (*In re Crowther*, 1887, 4 Mor. 100).

Moreover, the trustee is not (subs. 4) entitled to disclaim any property where a written application has been made to him by any person "interested in the property," requiring him to decide whether he disclaims, and the trustee has for twenty-eight days after its receipt, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims or not. The landlord is naturally a person "interested" within this provision (*In re Page*, 1884, 14 Q. B. D. 401). If the trustee, upon receiving notice under this provision, desire to extend the time for his decision, he should, in the absence of special circumstances, apply within the twenty-eight days (*Ex parte Lovering*, 1874, L. R. 9 Ch. 586); but an application has been entertained upon terms, even after that time (*In re Page, supra*). It is further provided (subs. 4) that in the case of a contract, if the trustee does not disclaim it (after receiving the written application) within the prescribed or the extended time, he is to be deemed to have adopted it.

Finally, the section contains (subs. 6) important provisions for vesting disclaimed property, on the application of a person either claiming an

interest in it or under a liability in respect of it not discharged by the Act, and on hearing such persons as the Court thinks fit (see *In re Morgan*, 1889, 22 Q. B. D. 592), either in him or in any other person entitled, or in any person to whom it may seem just that such property should be delivered by way of compensation for such liability; no conveyance or assignment for the purpose being necessary. In the case, however, of leaseholds no vesting order is to be made (subs. 6) in favour of a person claiming under the bankrupt whether as under-lessee or as mortgagee by demise except on the terms of making him subject to the same obligations as the bankrupt was subject to (or, if the Court think fit, as if the lease had been assigned to such claimant—53 & 54 Vict. c. 71, s. 13; see *In re Walker*, 1895, 64 L. J. Q. B. 783) at the time when the petition was filed, and if the case so requires, as if the lease had comprised only the property comprised in the vesting order (*id.*); and if he should refuse to accept those terms, he is to be excluded from all interest in and security upon the property (subs. 6). In the absence of any person claiming under the bankrupt willing to accept such an order, the Court may vest the bankrupt's interest in any person liable either alone or jointly with him to perform the lessee's covenants, discharged from all interests and encumbrances created by the bankrupt (*id.*). The effect of this long-drawn and somewhat difficult enactment will be found discussed in the following cases:—*In re Cock*, 1887, 20 Q. B. D. 343; *In re Finlay*, 1888, 21 Q. B. D. 475; *In re Morgan*, 1889, 22 Q. B. D. 592; *In re Britton*, 1889, 61 L. T. 52; *In re Smith*, 1890, 25 Q. B. D. 536.

### **Discontinuance.**—See ABANDONMENT OF ACTION.

**Discovery.**—1. *Generally.*—The right of discovery is defined in *Bay on Discovery* (p. 1), as the right by which a party to some proceedings (actually commenced or contemplated) before a civil Court is enabled, before the determination of any matter in question in those proceedings, to extort on oath from another party to those proceedings—(1) all his knowledge, remembrance, information, and belief of facts concerning the matter so in question; (2) the production of all documents in his possession or power relating to such matter. This latter branch of the subject is mainly dealt with in the article DOCUMENTS.

2. *In the High Court.*—Discovery may now be had in any cause or matter in any Division of the High Court, except in criminal proceedings, proceedings on the Crown side and Revenue side of the Queen's Bench Division, and the cases hereinafter mentioned (Order 31, r. 1; 68, r. 1).

In matrimonial causes discovery both by affidavit of documents and by interrogatories may be ordered in accordance with the practice of the Ecclesiastical Courts, though the rules of the Supreme Court as to discovery do not apply. But discovery will not be required of a party to divorce proceedings when it is sought for no other purpose than to prove such party guilty of adultery (*Redfern v. Redfern*, [1891] Prob. 139; *Harvey v. Lovekin*, 1884, 10 P. D. 122; *Euston v. Smith*, 1884, 9 P. D. 57).

The rules of the Supreme Court apply to Probate actions; and in addition to the discovery therein provided for there is the power to order an affidavit as to scripts, *i.e.* testamentary papers of the deceased (Probate Rules (1862), 30, 31, 32, and 75; Contentious Business).

Discovery is permitted in patent and trade-mark cases, notwith-

standing the statutory provisions as to particulars in such actions (*Birch v. Mather*, 1882, 22 Ch. D. 629; *Carver v. Pinto Leite*, 1871, L. R. 7 Ch. 90).

In actions on marine policies against underwriters, discovery may be ordered from the plaintiff of documents in the possession of persons interested, as well as of those in the possession of the plaintiff himself (*China Steamship Co. v. Commercial Assurance Co.*, 1881, 8 Q. B. D. 142; *West of England, etc., Bank v. Canton Insurance Co.*, 1877, 2 Ex. D. 472; Form: R. S. C. Appendix K, No. 19).

Discovery may also be had in bankruptcy proceedings (Bankruptcy Rules, r. 72, and 46 & 47 Vict. c. 52, ss. 24 and 27); and in references under sec. 14 of the Arbitration Act, 1889 (*MacAlpine v. Calder*, [1893] 1 Q. B. 545); and in interpleader proceedings (Order 57, r. 14). There is no power to compel discovery in election petitions (*Wells v. Wren*, 1880, 5 C. P. D. 546; *Moore v. Kennard*, 1883, 10 Q. B. D. 290).

Discovery may now be had in the High Court by and against infant plaintiffs and defendants and their next friends and guardians *ad litem* (Order 31, r. 29).

Where a party is a body corporate or joint-stock company or other body of persons empowered by law to sue or be sued, any opposite party may get an order to deliver interrogatories to any member or officer of such corporation, company, or body (Order 31, r. 5).

3. *Actions for Penalties and Forfeitures.*—In actions for penalties discovery cannot be had. The objection may be taken on the application for leave (and need not be on oath) or in the answer. The principle only applies to penalties imposed by way of punishment, and not to those given as damages or compensation. Discovery cannot be had in an action by a common informer for penalties for acting as a member of a local board without being duly qualified (*Martin v. Treacher*, 1886, 16 Q. B. D. 507; and see *Hunnings v. Williamson*, 1883, 10 Q. B. D. 459), or in an action for double value of goods fraudulently removed by a tenant (*Hobbs v. Hudson*, 1890, 25 Q. B. D. 232); or for treble damages for pound breach (*Jones v. Jones*, 1889, 22 Q. B. D. 425); or an action for penalties for infringement of copyright in registered designs under the Patents, Designs, and Trades Marks Act, 1883 (*Saunders v. Wiel*, [1892] 2 Q. B. 321). But discovery may be had in an action for penalties for infringement of the sole liberty of representing a dramatic piece under 3 & 4 Will. IV. c. 15, s. 2, such penalties being in the nature of damages (*Adams v. Batley*, 1887, 18 Q. B. D. 625), and in proceedings for an order under sec. 10 of the Rivers Pollution Act, 1876—although a default in obeying the order would subject the party to penalties (*In re County Council of Derbyshire and Mayor, etc., of Derby*, [1896] 2 Q. B. 297). The same principle applies to actions for forfeitures. Where in any action an issue is raised solely for the purpose of obtaining judgment for a forfeiture of land the Court will not, with regard to that issue, make any order either for the discovery of documents or for the administration of interrogatories (*Mexborough (Earl of) v. Whitwood Urban District Council*, [1897] 2 Q. B. 111).

4. *Purposes of Discovery.*—The objects of interrogatories are—(1) to obtain evidence in the shape of admissions (*q.v.*) from the other side in support of the case of the interrogating party (*A.-G. v. Gaskill*, 1882, 20 Ch. D. 519); (2) to destroy the adversary's case by cross-examination (see *Grumbrecht v. Parry*, 1884, 32 W. R. 558); (3) to ascertain the case of the adversary (see *Saunders v. Jones*, 1877, 7 Ch. D. 435). This last purpose may sometimes be as well effected by particulars as by interrogatories; and before

giving leave to interrogate, the master will take into account any offer made to deliver particulars or make admissions (Order 31, r. 2).

The answers to interrogatories, or any one or more of them, or any part of an answer, may be used in evidence by the opposite party at the trial. The judge may look at the whole of the answers, and, if he is of opinion that any parts of the answers not put in are so closely connected with those put in that they ought not to be separated, he may direct such other parts to be put in (Order 31, r. 24).

5. *Principles*.—The two cardinal rules in the law of discovery are—(1) the right, as a general proposition of every party, to the discovery of the evidences which relate to his own case; and (2) the privilege of every party to withhold a discovery of the evidences which exclusively relate to his own. He must disclose the nature of his case or the facts on which he relies in support thereof, but not the evidence in support of them (*Jyll v. Kennedy*, 1883, 8 App. Cas. at p. 225; *Bidder v. Bridges*, 1885, 29 Ch. D. 29). The rule applies to cases where title to land is in dispute as well as to other cases. Therefore a defendant in ejectment pleading that he is in possession is bound to disclose the nature of his possession, but not his title. For his title is not part of his own case or the plaintiff's (*id.*).

Following this principle, it is not permissible to interrogate as to the names of the other party's witnesses. But where the names of persons are material facts, they must be given, although it may be intended to call such persons as witnesses (*Marriott v. Chamberlain*, 1886, 17 Q. B. D. 154; *Humphries & Co. v. Taylor Drug Co.*, 1888, 39 Ch. D. 693; cp. *Hennessey v. Wright* (No. 2), 1888, 36 W. R. 879; 24 Q. B. D. 445, *n.*). So where conversations are relied on as part of the facts of the case their substance must be given, though not necessarily the exact words (*Eade v. Jacobs*, 1877, 3 Ex. D. 335).

6. *Objections to give Discovery*.—Discovery may be resisted on several grounds—

(a) In the case of interrogatories, that they are scandalous or irrelevant, or not *bona fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage (Order 31, r. 6).

(b) No person is compelled to say anything which criminales him, *i.e.* which may tend to bring him into the peril and possibility of being convicted as a criminal. It is enough if he swears that he believes the answer might criminate him (*Lamb v. Munster*, 1882, 10 Q. B. D. 110; 52 L. J. Q. B. 46; 31 W. R. 117; *Spokes v. Grosvenor, etc., Hotel Co.*, [1897] 2 Q. B. 124).

The principle extends (1) to adultery, on the ground that it exposes the party to ecclesiastical censure and punishment; so discovery is not granted in a divorce petition where the only object is to prove adultery (*Redfern v. Redfern*, [1891] Prob. 139), and (2) to actions for penalties or forfeiture of estate (see above).

(c) Communications made by a party for the purpose of obtaining advice and assistance of lawyers as regards the conduct of litigation and the rights of property, are generally privileged from production (*Wheeler v. Le Marchant*, 1881, 17 Ch. D. 675). Communications passing directly between the party and his legal professional adviser are privileged, whether or not made in reference to contemplated litigation, provided they are of a confidential character, made to or by a legal adviser in his professional capacity for the purpose of the client's obtaining his legal advice. Letters containing mere statements of fact are not privileged, unless of a profes-

sional and confidential character (*Minet v. Morgan*, 1873, L. R. 8 Ch. 361; *O'Shea v. Wood*, [1891] Prob. 286).

The privilege is even more extensive if litigation is anticipated or pending. See DOCUMENTS.

(d) Another ground of privilege from discovery is that the documents are of a public official nature, and that to produce or disclose them would be prejudicial to the public interest (*Hennessey v. Wright*, *supra*; *Wadcer v. East India Co.*, 1856, 8 De G., M. & G. 182; *The Bellerophon*, 1874, 23 W. R. 248; 44 L. J. Adm. 5). See further, DOCUMENTS.

7. *Time for Discovery*.—The right to discovery is limited to a definite case set up, and does not extend to fishing out a case from the opponent, and therefore a party cannot have discovery before he has stated his case, whether in the claim as plaintiff or in his defence as defendant.

The usual time for discovery is after defence, for until then it cannot be determined what the issues are. But discovery may be ordered at any time. In an Admiralty case interrogatories have been allowed on the part of the plaintiff before statement of claim (*The Isle of Cyprus*, 1890, 15 P. D. 134); in the Chancery Division and Queen's Bench Division discovery has in several cases been allowed before defence (see *Union Bank of London v. Manby*, 1879, 13 Ch. D. 239; *Zierenberg v. Labouchere*, [1893] 2 Q. B. 183, 188; and *Annual Practice*, note to Order 21, r. 1).

8. *Practice—Interrogatories*.—The plaintiff or defendant may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties.

Leave must be obtained by summons, and on the application for leave the particular interrogatories proposed to be delivered must be submitted to the Court or judge, and leave will be given as to such only of the interrogatories as the Court or judge considers necessary for disposing fairly of the matter or cause, or for saving costs. The application may be made on a summons for directions. The party applying must give security for the costs by paying into Court £5, and 10s. for every additional folio beyond the first five.

The interrogatories must be in the form given in Appendix B, R. S. C. 1883.

The answer to interrogatories is made by affidavit (Order 31, r. 8). The party must answer to the best of his knowledge, information, and belief (see *Bray on Discovery*, pp. 127–143). Objections to answer any of the interrogatories on any of the grounds above set out are to be taken in the answer (R. S. C. Order 31, r. 6).

If the person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a judge for an order requiring him to answer further, either by affidavit or by *viva voce* examination (Order 31, r. 11).

The party to whom the interrogatories are addressed must answer them within the time allowed—usually ten days (Order 31, r. 8). If he is interrogated about acts which are done in the presence of persons employed by him, their knowledge is his knowledge, and he is bound to answer in respect of that. A party cannot refuse to answer interrogatories relevant to the question in issue on the ground that they are as to matters which are not within his own knowledge, but are only within the knowledge of his servants or agents, if derived in the ordinary course of their employment; and he is bound to obtain the information from such agents or servants, unless he show that it would be unreasonable to require him to do so, or that such agents or servants have left his employment, or it would occasion unreasonable expense, etc. (*Bolckow, Vaughan, & Co. v. Fisher*

and Others, 1882, 10 Q. B. D. 161; *Rasbotham v. Shropshire Union, etc., Co.*, 1883, 24 Ch. D. 110).

The answers must be substantially full and complete, and must not be evasive or in an embarrassing form containing irrelevant matter mixed with that which is relevant (*Lyell v. Kennedy*, 1884, 27 Ch. D. 1).

If any party fails to comply with any order to answer interrogatories, or for discovery, he is liable to ATTACHMENT. He is also, if he is a plaintiff, liable to have his action dismissed for want of prosecution, and if a defendant, to have his defence struck out, and to be placed in the same position as if he had not defended (Order 31, r. 21).

As to discovery for the purpose of working out a decree in chambers, see JUDGMENT, and discovery in aid of execution, see EXECUTION.

9. *County Courts*.—Discovery may be had as in the High Court. The practice is generally similar to that of the High Court, and the leading principles governing the right of discovery are the same (see County Court Rules, Order 16, and 36 & 37 Vict. c. 66, s. 89).

10. *In the Mayor's Court, London*, discovery by affidavit of documents and interrogatories may be had in accordance with secs. 50 and 51 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and Order 5 of the Mayor's Court Rules, 1892.

[*Authorities for Discovery generally*.—*Annual Practice*, Notes to Order 31; *Bray on Discovery* (1885); *Kerr on Discovery* (1870).]

**Discretion, Judicial.**—1. Is a certain latitude or liberty accorded by statute or rules or the *cursus curie* to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him. The use of the word "judicial" limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious, or exempt from review. But the presence of the word "discretion" permits the judge to consider, as a judge, what are vaguely termed all the circumstances of the case and the purposes for which he is invested with the discretion, and to make his order by reference to considerations of convenience or utility or saving of expense rather than on considerations of strict law or technicalities.

Such discretion is usually given on matters of procedure or punishment, or costs of administration rather than with reference to vested substantive rights.

The matters which should regulate the exercise of discretion have been stated by eminent judges in somewhat different forms of words, but with substantial identity. When a statute gives a judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet (*Lee v. Bude Railway Co.*, 1871, L. R. 6 C. P. 576, 580, Willes, J., and see *Morgan v. Morgan*, 1869, L. R. 1 P. & M. 644, 647). "That discretion, like all other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed; but still it is a discretion, and for my own part I think that when a tribunal is invested by Act of Parliament, or by Rules with a discretion, without any indication in the Act or Rules of the grounds on which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves on which the discretion would run, for if the Act or Rules did not fetter the discretion of the judge, why should the Court do so?" (*Gardner v. Jay*, 1885, 29



Ch. D. 50, at 58, per Bowen, L.J.). Nor can one judge, by enunciating the mode in which he proposes as a general rule to exercise his discretion, fetter either himself or other judges of co-ordinate authority where the Act or Rules do not fetter the judicial discretion (*ibid.* 59). In other words, while caprice is excluded, judges must exercise their own discretion with regard to its object and the relevant rules of law, and not merely copy the decisions of others.

Where a power is given to a judge to be exercised for a particular object, it becomes the duty of the judge to exercise the power in a fit case (*Knowles v. Roberts*, 1887, 38 Ch. D. 263, 271, Bowen, L.J.).

The question of judicial discretion usually arises on appeal or review, when the appellant always urges that he had an absolute right to the order refused below, while the respondent contends that the Court below either decided with absolute correctness or in exercise of a discretion which ought not to be upset. The policy of the appellate Court is, with the object of saving expense, not to encourage appeals on matters within the discretion of the primary judge on matters of procedure (*Watson v. Rodwell*, 1876, 3 Ch. D. 380, 383; *Davy v. Garrett*, 1877, 7 Ch. D. 473, 486); where the primary judge has discretionary powers as to any matter, the appellate Court (if appeal is not prohibited) has the like discretion and the like duty to exercise it (*Davy v. Garrett*, *ubi supra*; *Jarmain v. Chatterton*, 1882, 20 Ch. D. 494, 499; *Crowther v. Elygood*, 1887, 34 Ch. D. 691, 697; *Knowles v. Roberts*, 1888, 38 Ch. D. 263, 271), but usually refrains from exercising its discretionary jurisdiction, except in a strong case, *i.e.* unless the primary judge has declined to exercise his discretion or has manifestly proceeded on a wrong ground or principle, or on an erroneous opinion on a point of law (*In re Martin*, 1882, 20 Ch. D. 365-369).

The decision below is treated somewhat as a verdict of a jury on motion for new trial, *i.e.* is not set aside unless it is perverse or manifestly founded on misconception of the law or facts, and not merely because the appellate Court would not itself have taken the same view of the facts or the appropriate order therein (*Macdonald v. Foster*, 1877, 6 Ch. D. 193, 195; *In re Martin*, 1882, 20 Ch. D. 365, 373).

2. Whether a judicial discretion is or is not given by statute or rule is a matter of interpretation of the documents in each case, with such outside light as the occasion renders permissible. The question is frequently raised on the presence or absence of the words "shall" or "may" in the instrument to be interpreted, upon the effect whereof the chief authorities are *Julius v. Bishop of Oxford*, 1881, 5 App. Cas. 214; and *Allcroft v. Bishop of London*, [1891] App. Cas. 666, where the question was raised as to ecclesiastical judges.

**Disease.**—The treatment of diseases is not ordinarily a matter with which English law is specially concerned. The two exceptions are (1) where the sufferers are paupers, when they can claim medical relief under the provisions of the Poor Law (*q.v.*); and (2) where the disease is dangerous and infectious, when the local sanitary authority is empowered to intervene for the protection of the community. Powers for this purpose are given by the Public Health Act, 1875, 38 & 39 Vict. c. 55, and by various subsequent Acts. The more important of these are the Infectious Diseases Notification Act, 1889, 52 & 53 Vict. c. 72, and the Prevention Act, 1890, 53 & 54 Vict. c. 34. These two Acts apply absolutely to London, but in other parts of the country only when adopted by the local sanitary

authority. Most of the more important and populous districts have now, it is believed, adopted them; but the adoption is still far from universal.

The Act of 1875, ss. 126-129, imposes penalties on persons who wilfully or carelessly cause risk of spreading infection (1) by exposing in any street, public place, shop, inn, or public conveyance, an infected person, or any bedding, clothing, rags, or other things which have been exposed to infection, until they have been properly disinfected; (2) by failing to disinfect any public conveyance after it has conveyed any person suffering from a dangerous infectious disorder, or any room and things in it liable to retain infection where such person has been lodged.

Besides this duty to disinfect, which is thus placed on the persons in charge of the persons or places known to be infected, the Act also, by sec. 120, imposes on the sanitary authority the duty of requiring the owner or occupier of any house to cleanse and disinfect such house or part thereof, and any articles in it likely to retain infection, wherever they are of opinion that so doing would tend to prevent or check infectious disease. The person required to do this is subject to a daily penalty for every day during which he makes default in complying with the requisition, and the local authority are bound to cause the necessary work to be done, and may recover the expense from him. The powers given by this section are large, but the machinery is clumsy, and causes much delay, which in cases of infection may be a serious matter. Where the Act of 1890 has been adopted, sec. 5 supersedes it and provides a quicker and more effective means of getting the work done. The Act of 1875, s. 121, empowers a local authority to order infected bedding, clothing, etc., to be destroyed, and sec. 122 empowers them to provide a proper place for their disinfection, and to cause such articles to be disinfected free of charge. Sec. 10 of the Act of 1890 further empowers them to compel the owners to deliver such articles up to be disinfected. The earlier Act contains no such power.

Any person suffering from a dangerous infectious disorder, who is without proper lodging or accommodation, or lodged in a room occupied by more than one family, or on board a ship, or lodged in a common lodging house, may be removed by a magistrate's order to any suitable hospital, the superintending body of which consents to receive him (s. 124). These orders are usually obtained *ex parte*, but anyone who wilfully disobeys or obstructs their execution is liable to a substantial penalty. The hospitals available for this purpose are usually those belonging to the sanitary authorities, as most general hospitals object to receive infectious cases. By sec. 12 of the Prevention Act, 1890, any person who is in "an hospital for infectious disease," and who would not on leaving be provided with accommodation in which proper precautions could be taken to prevent the spread of the disorder, may be detained in the hospital by magistrate's order for such time as may appear to be necessary. In these cases the expense of maintaining the patient in the hospital—being incurred for the public good—is to be defrayed by the sanitary authority.

Sanitary authorities are empowered by sec. 131 of the Act of 1875, either by themselves or jointly with other authorities, to provide for the use of the inhabitants of their district, hospitals or temporary places for the reception of the sick; and for this purpose may (1) build such hospitals; (2) contract for the use of any hospital or part of a hospital; (3) enter into any agreement for the reception of the sick inhabitants of their district on payment. This is apparently intended only to provide accommodation for epidemics or infectious diseases, leaving ordinary cases to be dealt with by the guardians under the poor law, or by voluntary hospitals not supported

by the rates. Where, however, a hospital has been provided, all sick inhabitants of the district are entitled to admission (*R. v. Ravenstall Mayor*, 1894, 10 T. L. R. 643). By sec. 132 the sanitary authority are entitled to recover from a patient, who is not a pauper, the expenses of his maintenance in their hospital; and if paupers are sent there, the guardians must pay for them (*R. v. Ravenstall Mayor, supra*). The general right to admission ought not therefore to impose an undue burden on the rates.

Hospitals for the treatment of infectious cases are, of course, most wanted in populous districts, but in such places they may themselves become nuisances. Sanitary authorities may not exercise their powers so as to injure the public or the rights of private individuals, and consequently must be careful in establishing such hospitals (see *Metropolitan Asylums Board v. Hill*, 1880, 6 App. Cas. 193). The mere fear of possible injury, however, is not sufficient to support the case of persons who desire to prevent a sanitary authority establishing a hospital for the use of their district; unless they give strong evidence of actual injury, the action will probably fail (*A.-G. v. Manchester Mayor*, [1893] 1 Ch. 19).

The best machinery for preventing the spread of infection is powerless where the existence of a centre of infection is unknown. Those suffering from infectious diseases and their friends are frequently disposed to keep the fact of the illness and the nature of the malady as far as possible a secret; and so to cause unnecessary risks to their neighbours, who are unaware of the danger which lurks in their midst. The sanitary authority must be apprised of the danger in order to use their legal powers to combat it. Some towns many years ago obtained parliamentary powers by which the notification of the existence of cases of infectious disease within their respective boundaries was made compulsory. The clauses giving these powers were not always identical, and it was thought that there should be some general legislation dealing with the subject. Accordingly, in 1889, the Infectious Diseases Notification Act was passed. It provides that in London and elsewhere, wherever it has been adopted by the local sanitary authority, the fact that anyone is suffering from an infectious disease must be notified to the medical officer of health of the district. The duty of giving information is imposed on the head of the family or person in charge of the patient, or in default of such person, on the occupier of the building, etc., of which the sufferer is an inmate, and on every medical practitioner attending or called in to visit the patient. A small fee is payable to a medical practitioner for each certificate duly sent in by him (s. 4), and a penalty is imposed on every person who fails to give a notice or certificate when required to do so (s. 3). The Act, sec. 6, gives a list of the principal diseases commonly deemed infectious, and sec. 7 further empowers the sanitary authority, with the sanction of the Local Government Board, to order that the Act shall in their district apply to any other infectious disease not specifically mentioned in the Act.

There are special provisions for dealing with epidemics such as *cholera*. These are explained in separate articles. See EPIDEMIC; QUARANTINE.

[*Authorities*.—See ordinary text-books on PUBLIC HEALTH, a list of which is appended to the article on that subject.]

**Disentailing Deed.**—A deed is now, by the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), substituted for the old method of barring an estate tail by means of the fictitious action at law called a common recovery. Under that Act (s. 15) every actual tenant in tail, whether

in possession, remainder, contingency, or otherwise, is able to dispose, for an estate in fee-simple, absolute, or for any less estate, of the lands entailed, against both those who claim under the estate tail and those whose estates are to take effect upon the determination, or in defeasance, of the estate tail. But the section does not extend to certain cases prohibited by 34 & 35 Hen. VIII. c. 8, where the Crown holds the reversion, nor to an estate in tail after possibility of issue extinct. The deed to operate under the Act must (except in the case of a lease at a rack rent, or five-sixths thereof, not exceeding twenty-one years) be enrolled in the Central Office of the Supreme Court within six months after execution.

Where, however, the tenant in tail is not in possession, but there is under the settlement an estate for years determinable on lives, or any greater estate prior to the estate tail, then the owner of such prior estate, or of the first of such prior estates, if more than one, is the protector of the settlement as regards the entailed lands (s. 22), even if he has encumbered his estate up to its full value. And (s. 34) his consent is required to make the disposition valid against those claiming after the estate tail, but not against those claiming under it. This consent must be given by the disentailing deed itself, or by some contemporaneous or previous deed also enrolled. Provision is made for the case of the protector being *non sui juris*. The settlor is also enabled to appoint persons to act as protectors. When a tenant in tail in remainder makes a disposition under the Act, but without obtaining the consent of the protector, the grantee obtains a base fee (*q.v.*), determinable upon the failure of his inheritable issue. A base fee may be enlarged into a fee-simple by the same means by which the estate tail could have been barred under the Act, including, of course, the consent of the protector (if any) for the time being (s. 35). In the case of copyholds, the disposition is by surrender entered upon the Court rolls (*Green v. Paterson*, 1886, L. R. 32 Ch. D. 95). There must be a disposition of the entailed property; a mere declaration is insufficient (*ibid.*; *Peacock v. Eastland*, 1870, L. R. 10 Eq. 17).

After some conflict of authority, it seems settled that to obtain payment of a fund in Court representing entailed land, a disentailing deed must be executed (*In re Reynolds*, 1876, L. R. 3 Ch. D. 61).

A disentailing deed takes the form of an ordinary conveyance, with the words "freed and discharged," etc., added to the habendum.

**Disfigurement** means in law an external injury detracting from personal appearance. In 1670, in consequence of *Sir John Coventry's* case, an Act (22 & 23 Car. II. c. 1, s. 7) was passed which made it felony to attack a man with intent to maim or disfigure. After passing through various re-enactments and consolidations, the term "disfigure" is still retained in secs. 18, 28, 29, of the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100). It is treated as a form of bodily harm distinct from **MAIMING**, which means a bodily injury affecting fighting capacity, and from **DISABLING** which creates a permanent disability (*R. v. Boyce*, 1824, 1 Moo. C. C. 29), and also from **wounding**, which involves a breaking of the skin with some instrument (*R. v. Stevens*, 1834, 1 Moo. C. C. 409; *R. v. Murrow*, 1835, 1 Moo. C. C. 456). See **BODILY HARM**.

**Dismissal of Action.**—An action may be dismissed (1) on the merits (*i.e.* judgment given for the defendant), or (2) on the ground of some

default on the part of the plaintiff. It is only necessary to refer here to cases falling within the second class.

If the plaintiff makes default in delivering his statement of claim, when he is bound to deliver one, the Court or a judge may, on the application of the defendant, dismiss the action (Order 27, r. 1, R. S. C. 1883). If he does not, within six weeks of the close of the pleadings, give notice of trial, the defendant may do so, or, instead of doing that, he may apply to have the action dismissed for want of prosecution (Order 36, r. 12); so, too, if the plaintiff makes default in giving particulars, or discovery, or in answering interrogatories, or if he fails to appear at the trial, and the defendant appears, a similar order may be obtained (Order 31, r. 21; Order 36, r. 32). Further, the Court or a judge, if satisfied that any action as shown by the pleadings is frivolous or vexatious, may make such order for it to be stayed or dismissed, or judgment to be entered as may appear just (Order 25, r. 4). Besides the power expressly given by the last-mentioned rule, the Court has inherent jurisdiction to dismiss or stay an action which is vexatious or frivolous, or an abuse of the process of the Court (*Davey v. Bentinck*, [1893] 1 Q. B. 187). See also ABUSE OF PROCESS; DEFAULT.

An order dismissing an action on the hearing of a point of law raised by the pleadings before the trial of an action is not a final order within Order 58, r. 3, which regulates the length of notice required in cases of appeals (*Salaman v. Warner*, [1891] 1 Q. B. 734).

[*Authority*.—Notes on Practice and Procedure in *Annual Practice*, 1897, pp. 204 *et seq.*, and references there cited.]

**Dismissal of Information or Complaint.**—In proceedings under the Summary Jurisdiction Acts the justices have power to dismiss the information or complaint, which (and not the warrant or summons) is the basis of the proceeding before them, (1) if the informant or complainant fails to appear at the time and place fixed for the return of the summons, or after due notice of the time and place where the defendant is brought up under a warrant (11 & 12 Vict. c. 43, s. 12); (2) if, after hearing the case, they are of opinion (*a*) that it is not made out, (*b*) that the charge (11 & 12 Vict. c. 43, s. 14; 42 & 43 Vict. c. 49, s. 27), though proved, is of too trifling a nature to merit more than nominal punishment (42 & 43 Vict. c. 49, s. 16). The latter power does not apply where the charge is of an indictable offence, as to which by pleading guilty the accused has given the justices summary jurisdiction (ss. 13, 16). The forms of order of dismissal are given in the schedule to the Summary Jurisdiction Rules of 1886. In case (*a*), the justices can award costs to the defendant; in case (*b*), they may order him to pay damages not exceeding forty shillings and costs. The costs in either case are recoverable summarily as civil debts, under sec. 47 of the Summary Jurisdiction Act, 1879 (*Ex parte Boaler*, 1892, 67 L. J. M. C. 29).

Where an information or complaint is dismissed on the merits the justices must, if required, at any time after the dismissal (*Costar v. Heathering*, 1852, 1 El. & Bl. 802) make an order of dismissal, and give the defendant a certificate or certified copy of the order, which, on production, is a bar to further proceedings to a subsequent information or complaint for the same subject-matter; and where they have summarily tried and dismissed a charge for an indictable offence is equivalent to an acquittal by the verdict of a jury (42 & 43 Vict. c. 49, s. 27 (4)). See Glen's *Summary Jurisdiction Acts*, 6th ed., by Gill and Douglas, pp. 74-76, 158. The form of certifi-

cate is No. 23 in the schedule to the Summary Jurisdiction Rules of 1886. The defence of *autrefois acquit* in such a case can be proved even without grant or production of the certificate (*Hancock v. Soames*, 1859, 28 L. J. M. C. 196). See AUTREFOIS ACQUIT; AUTREFOIS CONVICT.

Where a charge for an indictable offence is triable summarily and dismissed, the original order of dismissal is transmitted to and filed by the clerk of the peace (42 & 43 Vict. c. 49, s. 27 (6)).

### Disorderly House.—See BROTHEL.

**Disparagement.**—Under the old feudal law one of the incidents of tenure by knight's service was the right of the lord to dispose of his infant wards in marriage, subject to this, that the ward should not be "disparaged," i.e. he should not be given in marriage to someone of an inferior rank, or of deformed body, or weak mind, or possessing any other characteristic which would prevent the marriage being considered equal or fitting.

**Dispensing Power.**—The power once possessed by the Crown of dispensing with the statute law has now little more than a purely historical interest. It is said to have been copied from the dispensation or non-obstante clauses granted by the popes in matters of canon law, but even after the rise of Parliament as a constituent part of the State, the powers exercised by the Crown of suspending, altering, and dispensing with statutes were very large and ill-defined, and gave rise to frequent protests (Stubbs, ss. 290, 291). Under the Tudors and Stuarts the legality of the power of the Crown to dispense with statutes was repeatedly recognised in the Courts, which at the same time endeavoured to limit it by restrictions. It was laid down that the king could by dispensation make it lawful to do that which was *malum in se* as opposed to *malum prohibitum*, and could not grant dispensations which would be injurious to third parties. Further restrictions will be found suggested in the cases which are collected in Broom's *Constitutional Law*, p. 496, 2nd ed., but it would not be easy to extract from them any clear or consistent rule. See, however, the judgment of Vaughan, C.J., in *Thomas v. Sorrel* (Vaugh. 330).

The action of James II. in dispensing with the Test Act for the purpose of enabling Roman Catholics to hold office under the Crown, was supported by the Courts in the test case of *Goddard v. Hales* (11 St. Tri. 1165, where the attacks made on the judgment and Chief Justice Herbert's defence are also reprinted). At the Revolution this was one of the controversies finally settled by the BILL OF RIGHTS (see vol. ii. p. 90).

As to dispensations already granted, the Bill of Rights contained a saving clause providing that "no charter or grant or pardon granted before (23rd October 1689) shall be in any ways impeached or invalidated by this Act, but that the same shall be and remain of the same force and effect in law, and no other, than as if this Act had never been made." Dispensations granted before 1689 must therefore rest on their validity at common law. In the case of Eton College (Special Report by Philip Williams, 1816) a question arose before the visitor of the college, assisted by Sir William Grant and Sir William Scott, as to the validity of a dispensation from the college statutes granted by Elizabeth, enabling fellows to hold benefices

along with their fellowship. The dispensation was upheld, but no reasons were given for the decision; in the argument the Bill of Rights was referred to, but the dispensation was not treated as a dispensation with an Act of Parliament.

**Displace.**—Where an insurance company, by deed, covenanted with W. S. that in case they should at any time thereafter displace A. B. S. from his appointment as their agent at Glasgow, they would pay him a certain sum, and the company subsequently transferred their business to another company, it was held that this was a displacement of A. B. S. within the meaning of the covenant (*Stirling v. Maitland*, 1864, 5 B. & S. 840).

**Disposal.**—Where a testator devised a freehold house to his wife to be at her "will and disposal" in any way she might think best for herself and family, it was held that no trust was thereby created in favour of the testator's children (*Lambe v. Eames*, 1871, 40 L. J. Ch. 447; *In re Hutchinson and Tennant*, 1878, 8 Ch. D. 540; *In re Adams and Kensington Vestry*, 1884, 27 Ch. D. 394).

Where a testator gave his residuary estate to his wife "for her own absolute use, and benefit, and disposal," but without prejudice to such gift, in case any part thereof should "remain undisposed of" by her, he gave the same to certain persons, it was held that the wife took a life interest with a power of disposition by act *inter vivos* but not by will (*In re Pounder, Williams v. Pounder*, 1886, 56 L. J. Ch. 113; and cp. *In re Bush, Smith v. Harries*, W. N. 1885, 61). See Stroud, *Jud. Dict.*

**Dispose of.**—Where a testator bequeathed certain stock to a *feme-sole* for her sole and entire use during her life; that she shall not alienate it, but enjoy the interest of it during her said life, and at her decease she may dispose of it as she thinks fit, it was held in *Archibald v. Wright*, 1838, 9 Sim. 161, that this conferred a life interest with a power to dispose of the stock by will, and negatived a power to dispose of the fund in her life.

In *In re Thomson's Estate*, 1880, 14 Ch. D. 263, it was held that a gift of all his property by a testator to his widow "for the term of her natural life, to be disposed of as she may think proper for her own use and benefit, according to the nature and quality thereof," and, "in the event of her decease, should there be anything remaining of the said property or any part thereof," the same was to go over, gave no power of testamentary disposition to the widow with respect to the fund, and that on her death the gift over took effect. Although it was unnecessary for the decision of the case, the Court expressed the opinion that the widow took nothing but a life estate, with a right to enjoy the property *in specie*.

As to the meaning of "disposed of" in the Lands Clauses Act, 1845, see LANDS CLAUSES; see also, Stroud, *Jud. Dict.*

**Disposition.**—As to meaning of in sec. 2 of the Succession Duty Act, 1853, and in sec. 2 and subsec. (3) of the Finance Act, 1894, see *A.-G. v. Montefiore*, 1888, 21 Q. B. D. 461; and article DEATH DUTIES. The word is also used in its ordinary sense in sec. 77 of the Fines and Recoveries Act, 1833 (*Carter v. Carter*, 1895, 73 L. T. 437).

Where a debtor makes an assignment for the benefit of his creditors, having in his possession a chattel under a hire purchase which has not yet become his property, and there is no specific delivery thereof, the trustee under the deed, although without notice of the nature of the transaction, acquires no title to such chattel under sec. 9 of the Factors Act, 1889, as against the true owner; there is in such a case no "disposition" within the meaning of the section (*Kitto v. Bilbie*, 1895, 72 L. T. 266).

"A devise 'at the disposition' of A. carries the fee. It is equivalent to a devise to A. to give and sell at his pleasure" (Sugden, *Powers*, 8th ed., 104; see Stroud, *Jud. Dict.*).

**Dispute.**—A dispute within the meaning of secs. 3 and 4 of the Employers and Workmen Act, 1875, is not limited to a dispute which will give a cause of action to one of the parties; a large meaning is to be given to the term (*Clemson v. Hubbard*, 1876, 1 Ex. D. 179; *Charles v. Plymouth*, 1890, 60 L. J. M. C. 20).

Under a submission to arbitration, "should any dispute arise" in relation to a particular contract, all questions both of law and fact are included—all matters, indeed, about which disputes arise in consequence of the contract having been entered into (*Forwood v. Watney*, 1880, 49 L. J. Q. B. 447; *In re An Arbitration between Hohenzollern Co. v. City of London Contract Corporation*, 1886, 54 L. T. 596).

For "disputes" under the Building Societies Acts, see vol. ii. p. 297, and under the Friendly Societies and Savings Banks Acts, see FRIENDLY SOCIETIES and SAVINGS BANKS).

**Disqualification.**—*For Election to Parliament.*—Mental imbecility is a disqualification for election to the House of Commons, and the seat of a member who becomes insane may be rendered vacant by proceedings under the Lunacy (Vacating of Seats) Act, 1886. English and Scotch peers are disqualified for seats in the House of Commons, but Irish peers, unless elected as representative peers for Ireland, may sit for English and Scotch constituencies. Judges are disqualified, so also are the holders of a large number of offices of profit under the Crown—sheriffs, clergymen, government contractors, candidates who have been found guilty of corrupt practices, bankrupts, minors, and aliens (May, *Parliamentary Practice*, 10th ed., pp. 27 *et seq.*).

**Municipal Corporations.**—A mayor, alderman, or councillor, who is declared bankrupt, or who compounds with his creditors, or is (except in case of illness) continuously absent from the borough, being mayor, for more than two months, or, being alderman or councillor, for more than six months, becomes thereupon immediately disqualified (Municipal Corporations Act, 1882, s. 39). Candidates declared guilty of corrupt practices are subject to the same disqualifications as in parliamentary elections. Elective auditors, or other holders of offices of profit (other than those of mayor or sheriff) in the gift or disposal of the council, clergymen, or regular ministers of dissenting chapels, persons directly or indirectly interested by themselves or their partners in any contract or employment with or on behalf of the council (except those specially excepted), are also disqualified. Disqualification by having an interest in a contract with the council applies only during the continuance of the contract (*Lewis v. Carr*, 1876, 1 Ex. D. 484). Women are likewise disqualified for election as councillors.



**County Councils.**—The disqualifications under the Local Government Act, 1888, are practically the same as those under the Municipal Corporations Act, 1882, with this exception that clerks in holy orders and other ministers of religion are eligible for election. It has been expressly decided that women are not qualified to sit as county councillors (*Beresford-Hope v. Lady Sandhurst*, 1889, 23 Q. B. D. 79; *De Souza v. Cobden*, [1891] 1 Q. B. D. 687).

**Parish Councils, Boards of Guardians, etc.**—By sec. 46 of the Local Government Act, 1894, the disqualifications for election to these boards are set out; those disqualified are:—infants, aliens, persons who within twelve months before election, or since their election, have received union or parochial relief, persons who within five years before election, or since their election, have been convicted of any crime and sentenced to imprisonment with hard labour without the option of a fine, or to any greater punishment, and have not received a free pardon, or have within the same period been adjudged bankrupt, or have made a composition arrangement with their creditors, holders of paid offices under the board, and persons concerned in contracts with the board (other than those excepted). Women are not disqualified for election to such boards (s. 3, subs. 2; s. 20, subs. 2; s. 23, subs. 2).

**School Boards.**—The same disqualifications occur here through holding a place of profit under the board, and through being interested in contracts with the board (except those specially excepted), as in municipalities, county councils, etc. Women may be elected.

[For full details with respect to disqualification, reference must be made to the statute creating each particular board, and the proper headings in this work; the above is only a brief summary: and see *BIAS*.]

**Dissection.**—The dissection of corpses is regulated by the Anatomy Act, 1832 (2 & 3 Will. IV. c. 75), passed in consequence of the malpractices of body-snatchers and resurrection men in general, and in particular of the disclosures at the trial of Burke and Hare in Edinburgh (see preamble of Act). The Act provides for the regulation of schools of anatomy, and their inspection by salaried officials appointed by a Secretary of State (ss. 3–6).

Licences to practise anatomy may be granted by a Secretary of State to qualified medical practitioners or to medical students, or applications can be signed by two justices of the peace (s. 1).

Persons who have the lawful custody of a corpse (including the master of a workhouse, *R. v. Feist*, 1858, 1 Dears. & B. C. C. 59) may permit its dissection (this is apart from the right to have a post-mortem examination for the purpose of a coroner's inquest (s. 15)). Provision is also made for carrying out the directions of a deceased person to have his body dissected (s. 8). Receipt of bodies subject to a proper certificate is lawful for medical men and persons licensed to receive and dissect bodies subject to a proper medical certificate and the above-stated provisions (ss. 7–11), and to notice being given to a Secretary of State of the place where anatomy is to be practised (s. 12). Provision is made for decently interring the dissected corpse (s. 13), and for sending a certificate of interment to the official inspector (s. 15) (34 & 35 Vict. c. 16, s. 2; and see *CORPSE*).

There are no legal regulations as to the dissection of dead animals. As to the dissection of living animals, see *VIVISECTION*.

**Disselsin.**—See *ABATEMENT OF FREEHOLD*; *INTRUSION*.

**Dissenters.**—See NONCONFORMIST.

**Dissolution—**

*Of Building Societies.* See BUILDING SOCIETIES.

*Of Parliament.* See PARLIAMENT.

*Of Partnership.* See PARTNERSHIP.

**Distance, Measurement of.**—A general rule for the measurement of distances referred to in contracts was laid down by the Exchequer Chamber in *Mouflet v. Cole*, 1872, L. R. 8 Ex. 32. In that case the Court, in construing a covenant by the defendant not to carry on the business of a publican within half a mile of the plaintiff's premises, decided that the distance should be measured on the map in a straight line, and not by the nearest mode of available access; and, further, that the distance should be taken from the nearest point of the one house to the nearest point of the other, without regard to the situation of the doors.

A similar rule is laid down by sec. 34 of the Interpretation Act, 1889, where it is provided that in the measurement of any distance for the purposes of any Act passed after the commencement of that Act, "distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane."

**Distiller.**—No person may, without being licensed to do so, or on any premises to which his licence does not extend (a) have or use a still for distilling, rectifying, or compounding spirits; or (b) brew or make wort or wash, or distil low wines, feints, or spirits; or (c) rectify or compound spirits (43 & 44 Vict. c. 24, s. 5). Penalty for contravention, a fine of £500, and forfeiture of all spirits, vessels, utensils, and materials for distilling or preparing spirits in his possession. Every person who makes or keeps wash prepared or fit for distillation, or low wines or feints, and has in his possession or use a still, shall, as respects the duties, penalties, and forfeitures imposed by law on distillers, be deemed to be a distiller (*ibid.*, s. 6). And "distiller" is defined as "a person who distils" (*ibid.*, s. 3). A person shall not be entitled to a licence for or be permitted to make entry of a distillery, unless it is situate in or within a quarter of a mile of a market town (*ibid.*, s. 9 (1)). The Commissioners may, if they think fit, grant a licence for or permit entry to be made of a distillery situate beyond these limits, on the terms of a distillery providing to their satisfaction lodging for the officers to be placed in charge of the distillery. The lodgings must be conveniently situate, and must not form part of the distillery, or of the distiller's dwelling-house, and the annual rent charge for them unfurnished must not exceed £15 (*ibid.*, s. 9 (2), (3)). In England, no distiller keeping a still of less content than 3000 gallons may keep more than two wash stills and two low wine stills (*ibid.*, s. 7). No licence shall authorise a person to keep a still of less than 400 gallons, unless he has in use a still of that capacity, or produces a certificate from three justices that he is of good character, and that the yearly value of the premises is £10 at least (*ibid.*, s. 8). The Commissioners may refuse a licence for a still of less than 400 gallons, notwithstanding the production of the justices' certificate (*ibid.*), and may refuse a licence to keep a still in any building contiguous to a rectifying house, brewery, or vinegar manu-

factory (*ibid.*, s. 11). A licence may be suspended on conviction of obstructing an officer, on failing to provide a secure spirit store, or on failing to maintain proper lodgings for the officers (*ibid.*, ss. 9, 13, 152). A secure room is to be provided in every distillery for keeping the spirits distilled thereat; it must be approved by the Commissioners, and provided with fastenings to the satisfaction of the supervisor, and be kept locked by the officer at all times, except when he is in attendance; licence may be refused, or, if granted, may be revoked or suspended until such store be provided (*ibid.*, s. 13). Every distiller, rectifier, and compounder is to cause to be conspicuously marked with oil paint every room and utensil, etc., with the name and number thereof, the number for each description of vessel to be from one upwards, and keep the same so marked—penalty £50 (*ibid.*, s. 14, Sched. I. 10). A distiller, before he begins to brew or make wort, etc., and a rectifier or compounder, before receiving spirits, must make entry of the several places and utensils of trade; and no still or utensil may be entered to be used for more than one purpose (*ibid.*, ss. 19, 86). A rectifying house may not be within a quarter of a mile of a distillery, nor a distillery within a quarter of a mile of a rectifying house—penalty £500 (*ibid.*, s. 10; exception, s. 162). A licensed distiller must have a signboard with his name and the words “licensed distiller” over his gate or entrance (6 Geo. iv. c. 81, s. 25). Officers are empowered to enter distilleries and premises of rectifiers and compounders to gauge, etc.—penalty for obstructing officers, £200 (43 & 44 Vict. c. 24, s. 137). No still may be used by a distiller between 11 p.m. on Saturday and 1 a.m. on Monday (*ibid.*, s. 24). The regulations for charging duty are contained in sec. 46 of 43 & 44 Vict. c. 43. The duty on a distiller’s excise licence is £10, 10s.

**Distinct.**—As to meaning of distinct dwelling-house or building, under the Poor (Settlement) Act, 1825, sec. 2, see POOR LAW, *Settlement*.

Sec. 10, subsec. 2 (*b*) of the Trustee Act, 1893, enables a separate set of trustees to be appointed for any part of trust property held on trusts, distinct from those relating to any other part or parts of the trust property (See Hood and Challis, *Conveyancing and Settled Land Acts*, 4th ed., pp. 333, 334).

Where any house is divided into “distinct properties and occupied by distinct owners or their respective tenants,” such properties are to be charged distinct on the respective occupiers (Income Tax Act, 1842, s. 60, Sched. A, No. iv. r. 13). “Distinct properties” here mean distinct ownerships (*A.-G. v. Mutual Tontine Westminster Association*, 1876, 1 Ex. D. 469).

## Distress.

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Distress originally was a common law right or remedy, simply by way of pledge, until statute law (2 Will. & Mary, Sess. 1, c. 5, s. 2)

extended it and made it of more practical value by adding to it a power of sale. It may be explained as "a remedy for the performance of a duty, or the satisfaction of a demand, which consists in the taking, without legal process, of a personal chattel from the possession of the defaulter into the hands of the party grieved, as a pledge for the performance or satisfaction required; with a power in case of continued default to sell the thing taken in compensation for the damage sustained" (Bullen, *Dist.* 16).

It is proposed to deal shortly with some of the chief points relating to distress as between landlord and tenant, and subsequently to say a few words as to the other branches of the subject, viz. distress damage feasant, distress for rates and taxes, and distress in the case of copyholds. Generally, as between landlord and tenant, any rent reserved by demise, and in arrear, may be recovered by distress upon any goods or cattle found upon the demised premises without previous demand being made.

But a landlord may, either wholly or in a qualified manner, divest himself of this right, either by agreement or by showing a clear intention by conduct so to deprive himself of it (*Giles v. Spencer*, 1857, 3 C. B. N. S. 244; *Welsh v. Rose*, 1830, 6 Bing. 638; *Miles v. Furber*, 1873, L. R. 8 Q. B. 77; *Papé v. Westacott*, [1894] 1 Q. B. 272).

Unless there be an express and unqualified power of distress by agreement, the right depends upon there being an actual demise to a tenant with a fixed rent reserved (*Co. Lit.* 96 a; *Parker v. Harris*, 1692, 1 Salk. 262). The reservation of an annual sum in a demise will not in itself be sufficient (Bullen, *Dist.* 18; *Smith v. Mapleback*, 1786, 1 T. R. 441; 1 R. R. 247); nor is a money payment which is not strictly rent (*Hoby v. Roebuck*, 1816, 7 Taun. 157; 17 R. R. 477). But a tender in goods, or even in manual services (*Doe v. Benham*, 1845, 7 Q. B. 976), may be sufficient to support a distress so long as it is specific, i.e. either fixed or definitely ascertainable at a future period (*Co. Lit.* 96 a).

The rent must be payable at a time certain, otherwise recourse cannot be had to distress to recover it (*Co. Lit.* 47 a, 142 a). But when this condition is fulfilled it makes no difference that the rent is payable in advance (*Walsh v. Lonsdale*, 1882, 21 Ch. D. 9). It is essential also to the exercise of the right that there be a demise, express or implied, of lands and tenements (though where lands are demised with chattels the rent is deemed to issue out of the lands alone, and therefore can be distrained for, *Newman v. Anderton*, 1806, 2 N. R. 224); that such demise be subsisting at the time such rent becomes due (*Bridges v. Smyth*, 1829, 5 Bing. 410; *Alford v. Vickery*, 1842, Car. & M. 280); and that there be a reversion in such hereditaments vested in the distrainer at the time he distrains (Bullen, *Dist.* 26; *Staveley v. Allcock*, 1851, 16 Q. B. 636). Possession and acknowledgment of tenancy are sufficient to imply a demise (*Darbyz v. Lavington*, 1884, 13 Q. B. D. 347; *Yeoman v. Ellison*, 1867, L. R. 2 C. P. 681).

A demise of a mere easement will not support a distress (*Co. Lit.* 47 a, 142 a; *Capel v. Buzard*, 1829, 6 Bing. 150; *Hancock v. Austin*, 1863, 14 C. B. N. S. 634).

It follows from what has just been stated that the right to distrain is lost upon an assignment of the lessor's interest (*Hazeldine v. Heaton*, 1883, C. & E. 40), for he has no longer a reversion in respect of which he can distrain. Likewise a lessee cannot distrain upon his under-lessee for rent which becomes due after he has parted with his reversion (*Burne v. Richardson*, 1813, 4 Taun. 720; 14 R. R. 647).

It may be stated generally that, when rent is in arrear, nothing, except actual payment or some legal equivalent, can take away the right to dis-

train; and that the mere acceptance of security for rent (such as a promissory note), or of interest upon the rent, will not affect the landlord's right (*Davis v. Gyde*, 1835, 2 Ad. & E. 623; *Skerry v. Preston*, 1813, 2 Chit. 245), though it may be evidence of an agreement by him to suspend the exercise of that right during the currency of the instrument (*Palmer v. Bramley*, [1895] 2 Q. B. 405). But, as already mentioned, an agreement on the part of the lessor not to distrain until the performance of some condition (*Giles v. Spencer*, 1857, 3 C. B. N. S. 244), or until after a certain time (*Oxenham v. Collins*, 1860, 2 F. & F. 172), will likewise suspend the right of distress; and an agreement not to distrain may be implied also, as where allowances from rent, made in error, though with full means of knowledge, were held to operate as a settlement of account (Bullen, *Dist.* 171, 172; *Bramston v. Robins*, 1826, 4 Bing. 11). A similar agreement, too, may be implied in the case where the tenant, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, is compelled to make payments which, as between himself and his landlord, ought to have been made by the latter, e.g. of ground rent to a superior landlord, though this may also be regarded as actual payment by him of rent (*Graham v. Allsopp*, 1848, 3 Ex. Rep. 186; *Jones v. Morris*, 1849, 3 Ex. Rep. 742; *Sapsford v. Fletcher*, 1792, 4 T. R. 511). The Agricultural Holdings Act, 1883, 46 & 47 Vict. c. 61, s. 47, moreover provides that "where compensation due under this Act, or under any custom or contract to a tenant, has been ascertained before the landlord distrains for rent due, the amount of such compensation may be set off against the rent due, and the landlord shall not be entitled to distrain for more than the balance"; a provision which furnishes an exception to the common law rule that a tenant's mere right of set-off against his landlord will not take away the latter's right to distrain (*Absolom v. Knight*, 1742, Bull. N. P. 181).

If the rent be tendered, the tender must be of the correct sum due: it must be unconditional: and be made to the right person (Leake on *Contracts*, pt. iv. ch. 4; Roscoe, N. P. 675), i.e. either to the landlord himself (*Smith v. Goodwin*, 1833, 4 Barn. & Adol. 413), or to a bailiff having a distress warrant (*Hatch v. Hale*, 1850, 15 Q. B. 10), but not to a mere broker's man left in possession (*Boulton v. Reynolds*, 1859, 2 El. & El. 369). As regards its effect, tender upon the land before distress makes the distress wrongful: tender after the distress and before the impounding makes the detainer and not the taking wrongful; but tender after the impounding makes neither the one nor the other wrongful, for then it comes too late (Bullen, *Dist.* 176). The amount to be tendered varies according to the time or stage of the proceedings. If it be made before actual entry, tender of the amount of rent in arrear is sufficient (*Bennett v. Bayes*, 1860, 5 H. & N. 391; *The Six Carpenters' case*, 1 Sm. L. C., 10th ed., 127); if after entry, but before impounding, costs of distress must be added (*Vertue v. Beasley*, 1831, 1 Moo. & R. 21). In the former case a subsequent distress would be wholly wrongful; and in the latter only the further detention, or removal of the goods, would be so. If the tender be only made after the impounding, it is too late, as the goods are then in the custody of the law (*Ladd v. Thomas*, 1840, 12 Ad. & E. 117), but if made within the time which, as will be presently explained, is allowed for replevying them, it will render the landlord liable should he proceed to sell the distress (*Johnson v. Upham*, 1859, 2 El. & El. 250).

As a rule, only one distress is permissible, for several distresses, in respect of the same rent, are vexatious and oppressive (*Hutchins v. Chambers*, 1758, 1 Burr. 579). But exceptions to this rule occur when the landlord has been unable to satisfy his claim on the first occasion, owing to an insufficiency of the goods

available' (see *Dawson v. Cropp*, 1845, 1 C. B. 961), or when he has made a *bond fide* error in his valuation of the goods necessary to be distrained (see *Bagge v. Mawby*, 1853, 8 Ex. Rep. 641); and where he has abandoned the distress through the act or default of the tenant, as where the latter has requested forbearance, or entered into an arrangement which he fails to carry out (*Crosse v. Welch*, 1892, 8 T. L. R. 401, 709; *Thwaites v. Wilding*, 1883, 12 Q. B. D. 4).

*Who may distrain.*—Generally, anyone possessing a reversion out of which rent issues, may distrain; and, more particularly, the *executors* or *administrators* of any lessor who has demised for years or at will may (by 3 & 4 Will. iv. c. 42, ss. 37, 38) distrain for arrears of rent accrued during his life, both during and after the determination of the term, provided the distress be made within six calendar months of the determination of such term, and during the possession of the tenant from whom the rent is due. Also, as assignees, they may distrain for all rent of leaseholds accruing after the lessor's death.

*Guardians* may distrain on behalf of their wards during minority (Bullen, *Dist.* 71).

*Married women* may now distrain for rent in their own names; those married since January 1, 1883, when the Married Women's Property Act came into operation, may distrain in respect of all their property; those married before January 1, 1883, for rent of property accrued to them since then (45 & 46 Vict. c. 75). By the common law a husband may distrain for rent under leases of property belonging to his wife, but the latter may not in any case do so herself (Bullen, 54, 56; 32 Hen. viii. c. 37, s. 3); and this still applies in the case of women married before 1883, where the property demised by them has been acquired by them before that year.

*Mortgagees* may distrain under leases granted by their mortgagors prior to the mortgage, when notice of the mortgage has been given to the tenant, for rent due at the time of such notice, and for future rent (*Rawson v. Eicke*, 1837, 7 Ad. & E. 451; *Burroues v. Gradin*, 1843, 1 Dow. & L. 213); and also in the case of tenancies made after the mortgage, where a new tenancy may be implied with the mortgagee (*Doucne v. Thompson*, 1847, 9 Q. B. 1037). And, of course, when a lease has been made by a mortgagee under the provisions of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 18), the rent reserved can always be distrained for by him. When the relation of landlord and tenant exists between mortgagor and mortgagee, either in consequence of an attornment clause in the mortgage deed or by agreement to that effect between the parties, then, during the continuance of such tenancy, the right of distress may be enforced against anyone holding under the mortgagor, provided the true effect of the deed is to create such a tenancy (*West v. Fritche*, 1848, 3 Ex. Rep. 216; *Brown v. Metropolitan Counties, etc., Society*, 1859, 1 El. & El. 832; *Kearsley v. Philips*, 1883, 11 Q. B. D. 621; *Gibbs v. Cruikshank*, 1873, 28 L. T. 104).

A lessor who mortgages his interest loses his privity with his lessee, and with it his right to distrain (Bullen, *Dist.* 74); but a *mortgagor*, who remains in receipt of the rents and profits, may distrain as the mortgagee's agent (*Trent v. Hunt*, 1853, 9 Ex. Rep. 14; *Reece v. Strousberg*, 1885, 54 L. T. 133). A mortgagor may also distrain when he leases premises in compliance with the terms of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 18). He has the same right under the common law (*Alchorne v. Gomme*, 1824, 2 Bing. 54).

*Parish officers* may distrain, on the authority of any one of them, for

the rent of parish property (*Gouldsworth v. Knights*, 1843, 11 Mee. & W. 337).

*Receivers* of the High Court may distrain by themselves or by their bailiff, and without leave, except where it is doubtful to whom the rent belongs (*Bullen, Dist. 73*; *Bennett v. Robins*, 1832, 5 Car. & P. 379; *Pitt v. Snowden*, 1752, 3 Atk. 750). But a private receiver can only distrain when furnished with express authority (*Ward v. Shew*, 1833, 9 Bing. 608).

*Agents* should distrain in the names of their principals (*Bullen, Dist. 72*); but a person having distrained for rent due to himself may afterwards justify as agent for another (*Trent v. Hunt*, 1853, 9 Ex. Rep. 14).

*Joint tenants* may distrain, either together or singly, or by a bailiff, provided none dissent (*Pullen v. Palmer*, 1696, 3 Salk. 207; *Robinson v. Hofman*, 1828, 4 Bing. 562; *Bullen, Dist. 46*).

*Tenants in common* may distrain jointly or severally (*Whitley v. Roberts*, 1825, McCle. & Yo. 107; 29 R. R. 755; *Bullen, Dist. 48*).

*Lords of manors, tenants by elegit, and pur autre vie*, may also distrain for rent (*Laughter v. Humphrey*, 1596, Cro. (1) 524; *Bullen, Dist. 58*; *Lloyd v. Davies*, 1848, 2 Ex. Rep. 103; 32 Hen. VIII. c. 37, s. 4).

*Whose Goods may be distrained.*—Generally, a distress may be made upon any person's goods which may be found upon demised premises.

As against the tenant, however, any person whose goods may be taken in this manner can recover their value (*Exall v. Partridge*, 1799, 8 T. R. 308; 4 R. R. 656). Nor is such person disabled, as he himself is, from disputing the landlord's right to make the demise at all (*Tadman v. Herman*, [1893] 2 Q. B. 168).

There are, however, some classes of persons whose goods are exempt from distress: First, the goods of ambassadors and ministers of foreign States, and the goods of their servants, are (under 7 Anne, c. 12, s. 3) absolutely privileged. Such privilege is apparently not confined to the case of foreigners (*Macartney v. Garbutt*, 1890, 24 Q. B. D. 368), nor as regards servants to those of a domestic character (*Triguet v. Bath*, 1764, 3 Burr. 1478; and see *Novello v. Toogood*, 1823, 1 Barn. & Cress. 554; 25 R. R. 507).

Secondly, the property of lodgers is exempt from distress for rent owing by their immediate landlord, if they claim protection and comply with the requirements of The Lodgers Goods Protection Act (34 & 35 Vict. c. 79). By sec. 1 of this Act the lodger must serve the superior landlord, or bailiff, levying the distress, with a written declaration and a correct inventory of his goods or furniture, showing that the landlord's immediate tenant has no interest in the lodger's goods, which must be shown to be the property, or in the lawful possession, of the lodger. Such declaration and inventory must be served afresh on each occasion on which the landlord puts in a distress (*Thwaites v. Wilding*, 1883, 12 Q. B. D. 4).

The declaration, must also disclose what rent is due, and for what period, from the lodger to his immediate landlord; and such rent, or part of it, if sufficient to satisfy the claim, may be paid by the lodger to the superior landlord; and making a false declaration or inventory on the part of the lodger is a misdemeanour. If no rent is due from the lodger the declaration need not state that fact (*Ex parte Harris*, 1885, 16 Q. B. D. 130). Nor does the Act require that the declaration should contain a formal statement that the declarant is a lodger (*id.*). It will be further noticed that the Act is silent as to the time within which the declaration should be served (see on this *Sharp v. Fowle*, 1884, 12 Q. B. D. 385).

By sec. 2, if any superior landlord or bailiff, after service upon him of such a declaration and inventory, and after payment or tender by the lodger of any rent he ought to pay, proceeds with a distress on the goods of the lodger, he is guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for restoration of the goods.

The relation of landlord and lodger is a question of fact, for the determination of which the principal element is the retention or abandonment of control by the former. The exclusive occupation by the lodger of much the greater portion of the premises does not necessarily negative such a relation, nor would his unrestricted power of ingress and egress necessarily do so (*Ness v. Stephenson*, 1882, 9 Q. B. D. 245; *Brudley v. Baylis*, 1881, 8 Q. B. D. 195; *Phillips v. Henson*, 1877, 3 C. P. D. 26).

But it is clear that to constitute himself a *bona fide* lodger a person must usually sleep upon the premises, and that mere use for business purposes is insufficient (*Heawood v. Bone*, 1884, 13 Q. B. D. 179). On the other hand, the fact that neither the landlord nor any agent or servant employed by him sleeps upon the premises does not in itself prevent the relation from arising (*Morton v. Palmer*, 1881, 51 L. J. Q. B. 7).

Thirdly, the case of joint-stock companies requires special consideration. See COMPANY, vol. iii. p. 220, and note following additional points.

In spite of the somewhat stringent terms of sec. 163 of the Companies Act, 1862, avoiding any distress made after the commencement of a winding up upon the goods of a company which is either being wound up by the Court or subject to its supervision, it has frequently been decided that it should be read with an earlier section of the Act (s. 87), which provides that "no action or other proceeding shall be proceeded with or commenced against the company except with leave of the Court," the result being that where leave of the Court has been obtained, a distress may still be levied upon the goods of a company after the commencement of a winding up. Where a distress has been levied, though not completed, by sale at the time of the commencement of the winding up, the Court, as it would seem, has power to restrain it, but will not in general do so unless there be some special reason rendering it inequitable for the landlord to proceed (see per Stirling, J., in *In re Roundwood Colliery Co.*, [1897] 1 Ch. 373).

But the restriction, as will be noticed, only applies to the "effects of the company," and consequently does not prevent a distress upon goods which, though belonging to the company, are subject to a charge exhausting their whole value (*In re New City Club Co.*, 1887, 34 Ch. D. 646; see further, *In re Traders' North Staffordshire Co.*, 1874, L. R. 19 Eq. 60; *In re North Yorkshire Iron Co.*, 1878, 7 Ch. D. 661; *In re Oak Pits Colliery Co.*, 1882, 21 Ch. D. 322; *Stackell v. Chorlton*, [1895] 1 Ch. 378; *In re Higginsshaw Mills Co.*, [1896] 2 Ch. 544; Lindley on *Companies*, 5th ed., p. 680).

Where the relationship of landlord and tenant does not exist between a landlord creditor and a company, as in the case of a sub-tenancy, or an equitable assignment from his own tenant, and where consequently the landlord cannot prove for the rent, the Court will not restrict his right of distress; for he is not to be deprived of the right to obtain his rent from his own tenant by levying on any goods he may find on the premises, merely because those goods happen to belong to a company (Buckley on *Companies*, 6th ed., pp. 239, 240).

*What Classes of Goods are distrainable.*—Primarily, all goods found upon premises out of which rent in arrear issues may be taken by distress; but



this rule is qualified by the exemption (1) by the common law, and (2) by statute, of certain classes of goods, either wholly or conditionally; those classes of goods which are conditionally exempt being so only when and to such extent as a sufficient distress can be found upon the demised premises without them.

The onus of proving that there are insufficient goods on the premises to satisfy the landlord's claim without resorting to these lies upon the landlord (see *Nargett v. Nias*, 1859, 1 El. & El. 439). But he need not do more than establish that he believed on reasonable grounds that such was the case (*Jenner v. Yolland*, 1818, 6 Price, 3; 20 R. R. 608). And though goods belonging to strangers may always be taken to satisfy a distress, it has been held that if the landlord does not choose to seize them they are not to be taken into account in deciding whether there is or is not a sufficient distress, apart from those goods which enjoy a conditional privilege at common law (*Roberts v. Jackson*, 1795, Peake, Add. Ca. 36; 4 R. R. 885).

*Goods wholly exempt by Common Law.*—(1) Things which form part of the freehold by being affixed to it, or where, by their removal, damage to the freehold would be caused, e.g. the anvil in a blacksmith's forge, or the doors or windows of a house (Bullen, *Dist.* 92, 93; *Turner v. Cameron*, 1870, L. R. 5 Q. B. 306). Thus fixtures (*Dalton v. Whitem*, 1842, 3 Q. B. 961) and machinery affixed in order to improve the inheritance (*Hellawell v. Eastwood*, 1851, 6 Ex. Rep. 295) are exempt from distress. So when things being attached to the freehold are such that once taken they cannot be restored in their original state and condition, they are also privileged, e.g. fixtures (*Darby v. Harris*, 1841, 1 Q. B. 895) or a weaving frame (*Simpson v. Hartopp*, 1744, 1 Sm. L. C. 421, 10th ed.). Growing crops (1 Ro. Ab. 666) are exempt for this reason at common law; but they have been made specially distrainable by statute (11 Geo. II. c. 19, s. 8).

(2) "Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ" are wholly privileged from distress (*Simpson v. Hartopp*, *supra*), e.g. a carriage in the hands of a carriage-builder to repair (*Ward v. Ventom*, 1797, Peake, Add. Ca. 126); silk sent to a manufacturer to be made up (*Gibson v. Treson*, 1842, 3 Q. B. 39); the carcass of a beast sent to a slaughter-house (*Brown v. Shervill*, 1834, 2 Ad. & E. 138). A picture, however, returned to the artist to alter has been held to be distrainable, as not falling within the above rule (*Von Knoop v. Moss*, 1891, 7 T. L. R. 500). The trade must of course be one *bona fide* carried on upon the premises where the distress is levied (see *Edwards v. Fox*, 1896, 60 J. P. 404). The true reason for the exemption of goods of this class is that it is for the benefit of the trade of the person to whom they are consigned (*Joule v. Jackson*, 1841, 7 Mee. & W. 450; *Lyons v. Elliott*, 1876, 1 Q. B. D. 210). Likewise goods sent to be carried, pawned goods, stored furniture, goods in the possession and on the premises of innkeepers, of auctioneers, or in the hands of an agent, are exempt (*Gisbourn v. Hurst*, 1709, 1 Salk. 249; *Swire v. Leach*, 1865, 18 C. B. N. S. 479; *Miles v. Furber*, 1873, L. R. 8 Q. B. 77; *Crosier v. Tomkinson*, 1759, 2 Ken. Ld. 439; *Gilman v. Elton*, 1821, 3 B. & B. 75; 23 R. R. 567; *Williams v. Holmes*, 1853, 8 Ex. Rep. 861; *Findon v. McLaren*, 1845, 6 Q. B. 891).

But inasmuch as the trade must be a "public" trade, i.e. one in which the trader invites the public to intrust their goods to his care, the privilege does not extend to an agent who, though carrying on business as a general agent, is acting under an agreement as the special agent and representative of the owner of the goods (*Tapling v. Weston*, 1883, C. & E. 99). The privilege, too, attaching to goods in the hands of an auctioneer only attaches

in the case where they are lying on his own premises or on those of which he is in fact (whether permanently or temporarily, and whether rightfully or wrongfully) in occupation (*Lyons v. Elliott*, 1876, 1 Q. B. D. 210; *Brown v. Arundell*, 1850, 10 C. B. 54.)

But in every case the privilege extends to the conveyance in which the goods may be sent, provided the goods conveyed are themselves exempt (*Muspratt v. Gregory*, 1836, 1 Mee. & W. 633; 3 Mee. & W. 677), though it does not extend to articles (e.g. machinery) sent with the goods merely for their more convenient manipulation (*Wood v. Clarke*, 1831, 1 Crompt. & J. 484). And for privilege to attach, delivery of the goods is always required; so that a ship in dock in process of construction can be distrained upon for dock rent due from her builder (*Clarke v. Millwall Dock Co.*, 1886, 17 Q. B. D. 494).

(3) Perishable goods, which cannot be restored in the same condition likewise are exempt, e.g. sheaves of corn or carcases of animals (*Simpson v. Hartopp*, *supra*; *Morley v. Pincombe*, 1848, 2 Ex. Rep. 101).

But by 2 Will. & Mary, Sess. 1, c. 5, s. 3, sheaves or cocks of corn or loose corn, or in the straw, or hay "in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land," may be taken by distress.

(4) Animals, tools, or goods being actually used, e.g. a horse, an axe, or clothing, are exempt, because an attempt to seize them would probably cause a breach of the peace (*Simpson v. Hartopp*, *supra*; *Co. Lit.* 47 a; *Baynes v. Smith*, 1794, 1 Esp. 206).

Agreeably to the rule, it has been held that a dog is not exempt if not under personal control (*Bunch v. Kennington*, 1841, 1 Q. B. 679).

(5) Goods in the custody of the law, e.g. of a sheriff under a writ of execution (but so long only as he retains possession of them), are exempt (*Wharton v. Naylor*, 1848, 12 Q. B. 673; *Eaton v. Southby*, 1738, Willes, 131; *Budes v. Arundale*, 1813, 1 M. & S. 711; 14 R. R. 555), as it cannot be lawful to take goods out of the custody of the law (*Gill. Dist.* 40). The landlord's right, however, cannot of course be defeated by an execution which is merely collusive (*Smith v. Russell*, 1811, 3 Taun. 400; 12 R. R. 674). The privilege extends to goods in the hands of a person who has bought from the sheriff, for a reasonable time, to allow of removal from the premises (*In re Benn-Davis*, 1885, 55 L. J. Q. B. 217).

(6) Cattle, which are the property of a third person and stray on to the land of the tenant through his or his landlord's default in not repairing fences, are exempt (*Bullen, Dist.* 103).

(7) Animals *feræ naturæ* are exempt, because there is no property in them (*Co. Lit.* 47 a). But animals, once wild, which have been tamed and reclaimed, are distrainable (*Davies v. Powell*, 1737, Willes, 46).

(8) Loose money is exempt because it cannot be identified and restored (*Bac. Ab. Distress* (B)).

Certain kinds of property are made wholly exempt from distress by Act of Parliament. The statutes in question are here given in order of date:—

56 Geo. III. c. 50, s. 6.—This Act, which was passed to regulate the sale of farming stock taken in execution, prevents the sheriff from selling certain specified crops and produce in any case, and certain others only where the tenant has covenanted by deed or writing with his landlord not to remove them from the premises, unless the purchaser enters into a written agreement to consume them on the premises; and sec. 6 provides that where the above provisions have been complied with, the landlord shall not distrain upon corn, hay, straw, or other produce, which at the

time of the sale and execution of such agreement shall have been severed from the soil and sold, subject to such agreement, by the sheriff; nor on any turnips, whether drawn or growing, if sold according to the provisions of the Act; nor on any horses, sheep, or other cattle, nor on any beast whatsoever, nor on any waggons, carts, or other implements of husbandry kept or used on the land by any persons for threshing-out, carrying, or consuming such corn, hay, straw, turnips, or other produce.

On the construction of this somewhat verbose and difficult section the reader should consult *Hutt v. Morrell*, 1847, 11 Q. B. 425.

6 & 7 *Vict. c. 40*, s. 18.—By this provision, frames, looms, and apparatus, intrusted for the purpose of being used or worked in textile manufactures, or works connected therewith, are (whether lent on hire or not) exempt from distress, unless the rent be due by the owner of the frame or apparatus, or of any part thereof.

10 & 11 *Vict. c. 15*, s. 14, and 34 & 35 *Vict. c. 41*, s. 18.—These enactments provide that any meter or apparatus let to hire by the “undertakers” for the supply and consumption of gas, shall be exempt from distress. A gas stove has been held to be undistainable within the above provisions (*Gas Light and Coke Co. v. Hardy*, 1886, 17 Q. B. D. 619).

10 & 11 *Vict. c. 17*, s. 44.—By this provision, communication pipes and other necessary works laid down by the “undertakers” in houses not exceeding £10 in annual value, for the supply of water for domestic purposes, are exempt.

26 & 27 *Vict. c. 93*, s. 14.—This enactment confers immunity on meters and instruments let for hire to consumers, and pipes and other apparatus for the conveyance, reception, and storage of water.

35 & 36 *Vict. c. 50*, s. 3.—Railway rolling-stock which is in a “work” is exempt from distress for rent payable by the tenant of such work if it be not his own property, provided the ownership is properly indicated by some mark on such rolling-stock. If such rolling-stock be in part the property of the tenant, a distress may be levied to the extent of his interest therein (s. 5). See on this statute *Eastern Estate Co. v. Western Waggon Co.*, 1886, 54 L. T. 735.

45 & 46 *Vict. c. 56*, s. 25.—This provision exempts from liability to distress electric lines, meters, fittings, or apparatus belonging to the “undertakers,” if placed on premises not in their possession for the purpose of supplying electricity.

46 & 47 *Vict. c. 61*, s. 45.—By this section agricultural or other machinery which is *bona fide* the property of a person other than the tenant, and is on the latter's premises under a *bona fide* hiring agreement; and live stock which is also *bona fide* the property of such a person, and which is on the tenant's premises solely for breeding purposes, are exempt from distress.

51 & 52 *Vict. c. 21*, s. 4.—This enactment confers absolute privilege from distress upon the wearing apparel and bedding of the tenant or his family, and the tools and implements of his trade, to the value of £5. The mere fact that a tool or implement of trade is actually worked by the tenant's wife, and not by himself, does not destroy the privilege (*Churchward v. Johnson*, 1889, 54 J. P. 326). But the statute does not extend to any case where the interest of the tenant has expired, and where possession of the premises has been demanded, and where the distress is made not earlier than seven days after such demand.

The following classes of goods are conditionally privileged:—

(a) By Common Law, tools and implements of trade, *e.g.* threshing

machines, looms, stocking frames, and articles\* of husbandry (*Simpson v. Hartopp*, 1744, 1 Sm. L. C. 421; *Fenton v. Logan*, 1833, 9 Bing. 676; *Gorton v. Falkner*, 1792, 4 T. R. 565; 2 R. R. 463; *Davies v. Aston*, 1845, 1 C. B. 746).

(b) By Statute.—The Act 51 Hen. III. stat. 4 extends the conditional privilege now in question to beasts of the plough and sheep, whether belonging to the tenant or not, “which gain (i.e. improve) his land” (Com. Dig. Distress (C); *Keen v. Priest*, 1859, 4 H. & N. 236).

The Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), confers (s. 2) upon growing crops, seized and sold under an execution, privilege from distress for rent accruing due after the seizure and sale, provided sufficient distress can be found of the goods and chattels of the tenant.

The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), makes “agisted” live stock [see AGISTMENT] conditionally privileged, and enacts that if such stock be so distrained by reason of other sufficient distress not being found, there shall not be recovered by such distress a sum exceeding the amount of the price agreed to be paid for the feeding, or the amount remaining unpaid, if part of it has been paid. The “fair price” payable under the Act for agisted cattle need not be in money (*London and Yorkshire Bank v. Belton*, 1885, 15 Q. B. D. 457), but it must be a payment strictly for agistment, and not in the nature of rent for use and occupation (*Masters v. Green*, 1888, 20 Q. B. D. 807).

*Place of Distress.*—By 52 Hen. III. c. 15 (Statute of Marlbridge) it is unlawful for any person, except for the Crown or its officers, to distrain outside his fee, or in the highway or street (*Lewis v. Read*, 1845, 13 Mee. & W. 834; *Capel v. Buszard*, 1829, 6 Bing. 150). An exception to this rule may, of course, be made by express agreement between landlord and tenant (*Daniel v. Stepney*, 1874, L. R. 9 Ex. 185); and where mines are demised to lessees who work them with other adjacent mining property, a power to distrain for the reserved rent is often expressly made to extend to such other property (*In re Roundwood Colliery Co.*, [1897] 1 Ch. 373).

Next, the rule does not extend to the moiety of the road immediately adjoining the demised premises where the soil thereof *usque ad medium filum* belongs to the owner (*Hodges v. Lawrance*, 1854, 18 J. P. 347; *Gillingham v. Gwyer*, 1867, 16 L. T. 640).

Also by 11 Geo. II. c. 19, s. 8, cattle feeding upon a common, appendant or appurtenant to the demised premises, may be distrained there. And if cattle be seen to be driven off the demised premises to prevent distress, they may be followed and taken, even on the highway (*Co. Lit.* 161 a).

The exception, however, to the general rule which is of most practical interest, is in the case of the fraudulent removal of goods for the purpose of avoiding distress.

By 11 Geo. II. c. 19, s. 1, where a tenant “fraudulently or clandestinely” removes goods from demised premises to prevent distress, such goods may be followed and seized anywhere within thirty days, provided (s. 2) the goods have not previously been sold *bona fide* to a person ignorant of the fraud. The goods must, with the intention of benefiting the tenant (*Bach v. Meats*, 1816, 5 M. & S. 200; 17 R. R. 310), and to avoid a distress (*Opperman v. Smith*, 1824, 4 D. & R. 33; 27 R. R. 507; *Parry v. Duncan*, 1831, 7 Bing. 243), have been fraudulently removed; such removal must be after the rent has become due (*Rand v. Vaughan*, 1835, 1 Bing. N. C. 767); the goods must be such as would have been liable to distress if they had remained on the premises (*Gray v. Stait*, 1882, 11 Q. B. D. 668); and they

must be the property of the tenant at the time of the removal (*Thornton v. Adams*, 1816, 5 M. & S. 38; 17 R. R. 257; *Tomlinson v. Consolidated Credit Corporation*, 1889, 24 Q. B. D. 135).

(Sec. 3 of this Act provides against any other persons assisting in a fraudulent removal, or in concealing goods so removed, by imposing a penalty of double the value of such goods to be recovered by action of debt (see *Lister v. Brown*, 1823, 3 Dow. & Ry. 501; 26 R. R. 614; *Stanley v. Wharton*, 1822, 10 Price Ex. 138; 23 R. R. 683; *Brooke v. Noakes*, 1828, 8 Barn. & Cress. 375).

Sec. 4 provides for summary proceedings, where the value of the goods does not exceed £50, being taken before justices (see *Coster v. Wilson*, 1838, 3 Mee. & W. 411), an appeal to Quarter Sessions from their order being provided by secs. 5 and 6 (see *R. v. JJ. of Shropshire*, 1881, 6 Q. B. D. 669).)

*Time for Distress.*—A distress cannot be levied until the day after the rent is due, unless by reason of special agreement it is payable in advance (*Co. Lit.* 47 b, note 6; Bullen, *Dist.* 119).

By common law, a distress could be made only during the continuance of a demise (*Co. Lit.* 47 b; *Williams v. Stiven*, 1846, 9 Q. B. 14); and where the landlord has put an end to it by the exercise of his right of re-entry or some act equivalent thereto, the right is determined (*Murgatroyd v. Old Silkstone Co.*, 1895, 65 L. J. Ch. 111).

But by 8 Anne, c. 14, ss. 6 and 7, any person having rent in arrear or due upon any lease may distrain after the determination of such lease, provided such distress be made within six calendar months after such determination, and during continuance of the landlord's title or interest, and of the tenant's possession. The statute only applies where the determination of the tenancy is brought about by effluxion of time or notice to quit (*Doe v. Williams*, 1835, 7 Car. & P. 322; *Kirkland v. Briancourt*, 1890, 6 T. L. R. 441). For the statute to apply there must be a holding over by the tenant, as distinguished from a tenancy on fresh terms (*Wilkinson v. Peel*, [1895] 1 Q. B. 516), but such holding over need not necessarily be of a tortious character (*Nuttall v. Staunton*, 1825, 4 Barn. & Cress. 51; 28 R. R. 207). The possession retained by the tenant must be an exclusive possession (*Taylorson v. Peters*, 1837, 7 Ad. & E. 110; *Gray v. Stait*, 1883, 11 Q. B. D. 668).

The right to distrain, as already mentioned, continues during the subsistence of the reversion, but no longer.

A distress can only be made during the daytime, *i.e.* between sunrise and sunset (*Co. Lit.* 142 a; *Tutton v. Darke*, 1860, 5 H. & N. 647).

*The Extent to which Arrears may be recovered.*—Under 3 & 4 Will. IV. c. 27, s. 42, six years' arrears of rent may be recovered by distress. By 46 & 47 Vict. c. 61 (the Agricultural Holdings Act, 1883), however, a landlord is not entitled to distrain for rent due more than one year before the distress, provided that (in cases where, by usual course of dealing, payment of the rent is deferred for a quarter or half a year) the rent shall be deemed to have become due at such later date (*Ex parte Bull*, 1887, 18 Q. B. D. 642; *Crosse v. Welch*, 1892, 8 T. L. R. 401, 709). Moreover, by the Bankruptcy Acts, 1883 and 1890 (46 & 47 Vict. c. 52, s. 42, and 53 & 54 Vict. c. 71, s. 28), rent due from a bankrupt may be recovered by distress, upon his goods at any time, either before or after the bankruptcy, provided that, if the distress be levied after the bankruptcy, it shall be available only for six months' rent accrued due prior to the order of adjudication; but the

surplus left due may be proved for under the bankruptcy (see *Ex parte Hale*, 1875, 1 Ch. D. 285; *Ex parte Dyke*, 1882, 22 Ch. D. 410; *In re Howell*, [1895] 1 Q. B. 844). When within three months after such a distress a receiving order is made against the tenant, the right of distress is subject to the preferential claims for rates, taxes, wages, and salaries under 51 & 52 Vict. c. 62.

*In what Manner.*—A distress, unless made by a landlord in person, can only be made by a bailiff, duly certificated, under sec. 7 of the Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21 (see *Hogarth v. Jennings*, [1892] 1 Q. B. 907). Under the Distress for Rent Rules, 1888, either general or special certificates may be granted—by a County Court judge as to the former, and by a County Court judge or a registrar as to the latter; and a landlord is free to employ whichever kind of bailiff he pleases. As to the duration, renewal, and cancellation of certificates, see 58 & 59 Vict. c. 24, and Distress for Rent Rules, 1895.

The ordinary authority of a bailiff to distrain is a distress warrant, which, however, only indemnifies him against an absence of the right to distrain, but not against the consequences of irregularities on his or his servants' part in the mode or extent of levying (*Draper v. Thompson*, 1829, 4 Car. & P. 84); he may, however, get an absolute indemnity against anything except personal misconduct under the warrant (*Ibbett v. De La Salle*, 1860, 6 H. & N. 233). The bailiff, on the other hand, may become liable to his employer for negligence or misconduct resulting in loss to the latter (*White v. Heywood*, 1888, 5 T. L. R. 115; *Meyson v. Mapleton*, 1883, 49 L. T. 744).

A distress must be made by a legal entry upon the demised premises. The outer door of the premises (even of a portion not within the curtilage of the dwelling-house (*Brown v. Glenn*, 1851, 16 Q. B. 254)) may not be broken, though an inner door may, and if the outer door be open the distrainer may enter (*Co. Lit.* 161 a; *Browning v. Dann*, 1736, Bull. N. P. 81; *American, etc., Must Corporation v. Henry*, 1893, 62 L. J. Q. B. 388). Any of the usual means of entry, e.g. drawing bolts, turning keys, lifting latches, access through open windows (*Hancock v. Austin*, 1863, 14 C. B. N. S. 634; *Nixon v. Freeman*, 1860, 5 H. & N. 652; *Nash v. Lucas*, 1867, L. R. 2 Q. B. 590; *Attack v. Bramwell*, 1863, 3 B. & S. 520; *Crabtree v. Robinson*, 1885, 15 Q. B. D. 312), may be resorted to (*Ryan v. Shilcock*, 1851, 7 Ex. Rep. 72). Nor will climbing over an adjoining wall or fence in itself make the entry unlawful (*Long v. Clarke*, [1894] 1 Q. B. 119). But where, after a complete and legal entry, the distrainer is forcibly ejected, or where he is refused readmission after temporarily absenting himself, he is justified in breaking open a door or window and making a forcible re-entry (*Bannister v. Hyde*, 1860, 2 El. & El. 627; *Boyd v. Brofaze*, 1867, 16 L. T. 431), provided it be clear that no abandonment was intended by the distrainer (*Eldridge v. Stacey*, 1863, 15 C. B. N. S. 458).

Again, in cases of fraudulent removal under the Distress for Rent Act, 1737, 11 Geo. II. c. 19, before mentioned, goods may not only be followed during thirty days, but any "house, barn, stable, outhouse, yard, close, or place," in which they may have been deposited, may be broken open in the daytime, in the presence of a constable, and the goods seized (s. 7). But the landlord must comply strictly with the terms of the statute (*Rich v. Woolley*, 1831, 7 Bing. 651), one of which is, that in case of a dwelling-house, oath must first be made before a justice of a reasonable ground for believing the goods to be therein. Also, by 2 & 3 Vict. c. 47, s. 67, special

powers are given to constables within the metropolis to detain carts and carriages employed at night in removing goods, when they have reason to believe such removal is for the purpose of evading payment of rent.

Seizure of the goods is essential, after entry, to render a distress effectual, but it may be either actual or constructive only; all that is necessary being to show by acts or words a clear intention to distrain (*Hutchins v. Scott*, 1837, 2 Mee. & W. 809; *Swann v. Lord Falmouth*, 1828, 8 B. & C. 456). It has been held sufficient intention to distrain when a landlord has taken means, whether effectual or not, to detain the goods for rent in arrear (*Cramer v. Mott*, 1870, L. R. 5 Q. B. 375; *Werth v. London and Westminster Loan Co.*, 1889, 5 T. L. R. 521). After seizure, an inventory of goods should be made, a copy of which, with a written notice (*Wilson v. Nightingale*, 1846, 8 Q. B. 1034) of the distress, and the cause of it, must be served (*Kerby v. Harding*, 1851, 6 Ex. Rep. 234) either on the tenant personally (*Walter v. Rumbal*, 1695, 1 Raym. (Ld.) 53), or left at "the chief mansion-house or other most notorious place charged with the rent distrained for" (2 Will. & Mary, Sess. 1, c. 5, s. 2); otherwise the sale of the goods will be wrongful. The notice of distress need not specify the amount of rent which is in arrear (*Tancred v. Leyland*, 1851, 16 Q. B. 669).

The next step is to impound the distress in a proper pound, where (under the statute last cited) it must remain for five clear days (*Robinson v. Waddington*, 1849, 13 Q. B. 753); after which, unless previously replevied, or satisfaction made, the goods may be sold. The sale may be either privately or by public auction, but the best price possible must be obtained (Bullen, *Dist.* 160, 161), and for any act which prevents this result the distrainor will be responsible (*Poynter v. Buckley*, 1833, 5 Car. & P. 512; *Hawkins v. Walrond*, 1876, 1 C. P. D. 280). Any overplus after sale should be left in the hands of the sheriff, under-sheriff, or constable of the county or place where the distress is taken, for the owner's use (2 Will. & Mary, Sess. 1, c. 5, s. 2); while surplus goods may be returned to the premises if they have been removed therefrom (*Evans v. Wright*, 1857, 2 H. & N. 527). The five days' limit prior to sale is now (by 51 & 52 Vict. c. 21, s. 6) capable of being extended to fifteen days on the written request of the tenant or owner of the goods that such extended time be given. No appraisalment—formerly required by 2 Will. & Mary, Sess. 1, c. 5, s. 2—is now necessary under this Act, unless specially requested and paid for by the tenant or owner, who may further make a written request for the removal, at his own risk and expense, of the goods to a public auction-room or other fit place specified by him. But in the case of a distress of growing crops, under 11 Geo. II. c. 19, s. 8, it would appear still to be required. As to the pound itself, it may be either a common or public pound, or a private pound; and it may be either overt or covert, *i.e.* open overhead or covered in, the former being suitable only for cattle and rough goods, and the latter for such things as furniture and other articles liable to be damaged or stolen in an open uncovered place (Bullen, *Dist.* 142). For the protection of animals distrained and impounded, it has been enacted by 12 & 13 Vict. c. 92, ss. 5 and 6 (amended by 17 & 18 Vict. c. 60, s. 1), that every person who shall impound (see *Dargan v. Davies*, 1877, 2 Q. B. D. 118) any animal shall, under a penalty of twenty shillings, provide such animal with food and water; and provision is also made for recovery from the owner of the animal, by the person who impounds it, of the expense of supplying food to it, and for selling the animal to meet such expense if necessary. The distrainor is responsible for the fit and safe condition of a pound in which

he places cattle or goods distrained; but if cattle should die while impounded through no fault of the distrainor, he is not liable, and may even make another distress to compensate himself (Bullen, *Dist.* 143, 144). Originally, by common law, a distress could be impounded in any county, but as great hardships resulted from this, through owners not being able to trace their cattle, either to feed or to replevy them (Bullen, *Dist.* 144), the Statute of Marlbridge (52 Hen. III. c. 4) prohibited distresses from being carried out of the county where made; and a later statute, 2 Ph. & Mary, c. 12, s. 1, extended this relief by prohibiting distresses of cattle from being driven out of the district where made, except to a pound overt not more than three miles away, and provided that cattle taken at one time should not be impounded in several places (thereby necessitating several replevies).

The more usual and convenient mode, however, at the present day is to impound the goods upon the premises themselves where the distress is taken, it having been enacted by 11 Geo. II. c. 19, s. 10, that any person lawfully taking a distress may impound, or otherwise secure, it in such a place or part of the premises chargeable with the rent as shall be most fit and convenient. Already the statute 2 Will. & Mary, Sess. 1, c. 5 s. 3, had similarly protected the owners of "sheaves or cocks of corn, or corn loose or in the straw, or hay lying" on the demised premises, by requiring that these crops "be not removed by the person or persons distraining, to the damage of the owner thereof out of the place where the same shall be found and seized, but be kept there (as impounded) until the same shall be replevied or sold." In like manner also the statute 11 Geo. II. c. 19, s. 8, provides that growing crops when distrained shall, on being cut when they are ripe, be laid up in "barns, or other proper place, on the premises," although (by sec. 9) such products may be removed to some other neighbouring barn or place procured for the purpose, if there be no proper place on the premises.

There is a general rule, with regard to property impounded for a distress, of whatsoever kind it may be, and wheresoever it may be taken, that the distrainor (who holds it as a pledge) has no right whatever to use it for his own benefit (Bullen, *Dist.* 149); but may only use it if necessary to preserve it in the same state and condition in which it was when taken, as in the scouring of armour to keep it from rust, or the milking of milch cows (*Id.*).

The costs and expenses of proceedings in distress are now regulated by scales of costs given in the Distress for Rent Rules, 1888. Two scales are given according as the amount of rent, demanded and due, is over £20 or not; if over £20, the only rule formerly was that the charges must be reasonable; whilst if not over £20, the matter was regulated by a statute (57 Geo. III. c. 93), the provisions of which, though still unrepealed, are now practically superseded.

*Rescue and Pound Breach.*—There are two instances of wrongful interference with distress (other than Fraudulent Removal, which has already been mentioned), namely, Rescue and Pound Breach.

Rescue is the forcible re-taking possession of the distress by the owner or other person from the custody of the distrainor, without there having been any abandonment of it by him, and before it has been impounded (Bullen, *Dist.* 206; *Iredale v. Kendall*, 1878, 40 L. T. 362).

There may be rescue in law as well as in fact, as where cattle distrained go upon the premises of the owner whilst being driven to the



pound, and he refuses to deliver them up upon demand by the distrainor (*Co. Lit.* 161 a).

When, however, a distress, having been made without cause, or contrary to law, as in the cases of no rent being due, or seizure being made on the highway, is being conveyed to a pound, it may be rescued lawfully (*Co. Lit.* 160 b, 161 a; Bullen, *Dist.* 207).

Pound breach is the breaking open of a pound in order to re-take cattle or goods, and is illegal, whether the taking be forcible or not, the property being deemed to be in the custody of the law (*Co. Lit.* 47 b; Bullen, *Dist.* 206, 207; *Reddell v. Stovey*, 1841, 2 Moo. & R. 358).

The distrainor has a right in the event of rescue or pound breach to resort to recaption, but it must be done forthwith, and without breach of the peace (*Rich v. Woolley*, 1831, 7 Bing. 651); or he may bring an action for trespass (Bullen, *Dist.* 209); or proceed for treble damages under 2 Will. & Mary, Sess. 1, c. 5, s. 4, either against the offender or against the owner of the goods, if they be found to have come into his possession (see on this section, *Castleman v. Hicks*, 1842, Car. & M. 266; *Firth v. Purvis*, 1793, 5 T. R. 432; 2 R. R. 637; *Jones v. Jones*, 1889, 22 Q. B. D. 425).

*Remedies for Wrongful Distress.*—Wrongful distress is of three different kinds—

(1) *Irregular Distress*—When some wrongful act is done by the distrainor at a step in the proceedings subsequent to the seizure of the goods, *c.g.* by selling the distress without having given the time prescribed by statute for replevying; or in not applying the surplus sale money as required; or in having omitted to give notice of distress.

The remedy for irregular distress, in any such case, is by action for damages "for improperly distraining" (R. S. C., 1883, Appendix A, Part III. s. 4); and any owner of the goods so wrongfully distrained may bring the action against either the distrainor, or his bailiff, or against both (*Kerby v. Harding*, 1851, 6 Ex. Rep. 234; *Haseler v. Lemoyne*, 1858, 5 C. B. N. S. 530). Where no actual damage has resulted to the plaintiff, he cannot succeed in this action (11 Geo. II. c. 19, s. 19, *infra*; *Rodgers v. Parker*, 1856, 18 C. B. 112; *Lucas v. Tarleton*, 1858, 3 H. & N. 116); but where there has, he can recover the real value of the goods distrained, minus the rent and expenses (*Biggins v. Goode*, 1832, 2 Crompt. & J. 364; *Knight v. Egerton*, 1852, 7 Ex. Rep. 407).

(2) *Excessive Distress*—When the distrainor, while otherwise distraining lawfully, seizes more goods than are reasonably necessary to realise the rent due, and expenses of sale.

The remedy here is by action for damages for excessive distress (Statute of Marlbridge, 52 Hen. III. c. 4); but if the distrainor should have acted with a reasonable and honest discretion, he will not be liable (*Roden v. Eytton*, 1848, 6 C. B. 427). The action may be brought against the landlord or bailiff at the instance either of the tenant or of the owner of the distrained goods, and even of a person having the enjoyment of, but no property in, them (*Fell v. Whittaker*, 1871, L. R. 7 Q. B. 120). The question whether the distress is excessive or not is one of fact (*Smith v. Ashforth*, 1860, 29 L. J. Ex. 259).

The old rule, that any wrongful act in levying a distress when the rent distrained for was justly due, made the distrainor a trespasser *ab initio* (*q.v.*) (see *The Six Carpenters' case*, 1611, 1 Sm. L. C. 127), has been done away with by the statute 11 Geo. II. c. 19, ss. 19, 20, which enact that the party aggrieved may only recover for the special damage he may have sustained.

and not at all if tender of amends has been made before action brought: provisions which apply to excessive as well as to irregular distress. The damages recoverable in excessive distress are the value of the goods, less the rent and expenses (*Wells v. Moody*, 1835, 7 Car. & P. 59), or if no sale has taken place, the damage incurred by the temporary loss of their use (see *Chandler v. Doulton*, 1865, 3 H. & C. 553).

(3) *Illegal distress* arises either when there is no right of distress at all, through the right having been lost, or through some one or more of the conditions necessary to ensure it not having been complied with; or when an existing right of distress has been vitiated by some wrongful act at the outset in levying it, in non-compliance with some one or more of the requirements as to time, place, or mode of entry, or by the seizure of goods or cattle which are exempt through privilege.

An action for damages "for improperly distraining" (R. S. C. 1883, Appendix A, Part III.) will likewise lie, for an illegal distress, upon any one of these grounds above mentioned, and it should be brought against the bailiff; but in a case where no right to distrain exists at all, the action will lie against the landlord (*Lewis v. Read*, 1845, 13 Mee. & W. 334; *Freeman v. Rosher*, 1849, 13 Q. B. 780). It may be brought by a person who has only a qualified property, such as that of a pledgee, in the goods which have been seized (*Swire v. Leach*, 1865, 18 C. B. N. S. 479). In this action (as well as in those for irregular and excessive distress), the defendant has been empowered to plead "not guilty by statute" (11 Geo. II. c. 19, s. 21), in those cases where the distress complained of is made on the demised premises (*Postmaen v. Harrell*, 1833, 6 Car. & P. 225). This right, subject to the qualification that he must obtain the leave of the Court to plead any other defence with it, he retains under the Judicature Acts (R. S. C. 1883, Order 19, r. 12). But it is now controlled by the provisions of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

The damages recoverable in this action, if the goods distrained have been sold, are their value (*Keen v. Pricst*, 1859, 4 H. & N. 236). But if the distress has been withdrawn before removal of the goods, only the actual damage sustained can be recovered (see *Hogarth v. Jennings*, [1892] 1 Q. B. 907).

Besides the remedy by action, relief by injunction may also be sought in cases of actual or threatened wrongful distress (Judicature Act, 1873, s. 25, subs. 8; *Walsh v. Lonsdale*, 1882, 21 Ch. D. 9; *Shaw v. Jersey*, 1879, 4 C. P. D. 359). But it is believed to be an invariable rule, as a condition of granting such relief, that the tenant should pay the money claimed for rent into Court.

In cases of wrongful distress upon holdings where the Agricultural Holdings Act (46 & 47 Vict. c. 61) applies, the County Court and Courts of Summary Jurisdiction have power (under s. 46) to order goods wrongfully taken in distress to be returned to their owner, and to make any other order in the matter which justice requires. See article, COUNTY COURTS, vol. iii. p. 548. There is an appeal in these cases from the Court of Summary Jurisdiction to Quarter Sessions (s. 46), and from the County Court, subject to the provisions of the County Courts Act (51 & 52 Vict. c. 43, s. 120).

Under the "Metropolis Police Courts Act" (2 & 3 Vict. c. 71, s. 39), magistrates have power in cases of wrongful distress upon weekly or monthly tenants, or upon those whose rent does not exceed £15 a year, to summon the parties, and adjudicate summarily upon the matter.

Under the Law of Distress Amendment Act, 1895 (58 & 59 Vict.

c. 24, s. 4), any Court of summary jurisdiction, on complaint that goods exempt from distress under 51 & 52 Vict. c. 21, s. 4 (i.e. wearing apparel, bedding, and tools of trade to the value of £5), have been wrongfully levied upon, may, by summary order, direct their restoration, or if already sold, may order payment of what it shall consider their value to be made by the person in default.

By 2 Will. & Mary, Sess. 1, c. 5, s. 5 (in the case only of an *illegal* distress, where either no rent was in arrear at all or where none was due to the person who has distrained), the owner of goods thus taken may when the goods have been sold recover double their value against the wrongdoer (see *Masters v. Farris*, 1845, 1 C. B. 715).

*Replevin*, which also applies only to the case of an illegal distress, is the process by which the owner may obtain re-delivery of his goods taken in distress, on giving security, to try the right by action, and to restore the goods to the distrainer if the distress be upheld (Bullen, *Dist.* 243). See REPLEVIN.

\* *Distress damage feasant* is the redress for trespass committed by cattle or other objects. This is probably the earliest form of distress (Bullen, *Dist.* 4, 5). It is defined as "a remedy by which, if cattle or other things be on a man's land encumbering it, or otherwise doing damage there, he may summarily seize them, without legal process, and retain them impounded as a pledge for the redress of the injury he has sustained" (Bullen, *Dist.* 227). It is applicable whenever anything, animate or inanimate, is upon the land actually doing damage thereto or to its produce, and is available for any person who is aggrieved by such damage. As an instance of distress upon inanimate things damage feasant, e.g. railway rolling-stock, see *Ambergate Rwy. Co. v. Midland Rwy. Co.*, 1853, 2 El. & Bl. 793, and turves laid upon a common, see *Bromhall v. Norton*, 1683, Jones T. 193. A distress damage feasant may be made by the distrainer during either the day or night; "otherwise it may be the beasts will be gone before he can take them" (*Co. Lit.* 142 a).

The owner of the soil may distrain cattle damage feasant for injury to plants or trees in which he has an interest, although he has no interest in the herbage or pasture (*Hoskins v. Robins*, 1671, 2 Saund. 323). Also a mere grantee of the vesture of the land may so distrain (*Burt v. Moore*, 1793, 5 T. R. 329; 2 R. R. 611). Commoners, likewise, may distrain to protect their rights when injured by things damage feasant (Bullen, *Dist.* 228; 1 Roll. Ab. 405), e.g. where cattle are put upon a common without any colour of right (*Hall v. Harding*, 1769, 4 Burr. 2426). Commoners may distrain upon cattle agisted by the lord and improperly put on the common (Bullen, *Dist.* 229).

The right to make or authorise a distress damage feasant apparently depends upon the possession of the land in respect of which the injury is done (Bullen, *Dist.* 232; *Culley v. Spearman*, 1795, 2 Black. H. 386; 3 R. R. 420).

The ownership of the cattle or things so distrained when actually trespassing is immaterial, as is also the question through whose default they trespassed (1 Roll. Ab. 665).

The only exemption from liability to distress damage feasant is in the case of things in actual use (*Hoskins v. Robins*, 1671, 2 Saund. 323; *Storey v. Robinson*, 1795, 6 T. R. 138; 3 R. R. 137). The other exemptions from distress for rent do not apply to distress damage feasant (Bullen, *Dist.* 89, 232). A distress damage feasant can be made only for the particular

damage done at the time when the distress is levied (*Vaspor v. Edwards*, 1701, 12 Mod. Ca. 658). But the same cattle may be distrained a second time for a new injury, if taken trespassing again subsequently to a distress, even though they had been replevied after the first distress (Bullen, *Dist.* 234).

A distress damage feasant must be made during the actual trespass (see *Wormer v. Biggs*, 1845, 2 Car. & Kir. 31), and only on the spot where the injury is done (Bullen, *Dist.* 236). The rule as to tendering amends is the same as in that of a distress for rent (Bullen, *Dist.* 235).

In case of wrongful distress damage feasant the owner may make rescue, or he has a remedy by replevin, trespass, or trover (Bullen, *Dist.* 239).

*Distress in Copyhold Tenures.*—Distress is also available to enforce certain rights, services, suits, customs, and rents arising in copyhold tenures.

If fealty be refused by a copyholder, the lord may seize some property of the tenant and detain it as a pledge, but he cannot sell it as an ordinary distress (Elton on *Copyholds*, 2nd ed., 196).

A lord of a manor may distrain on his tenant for non-performance of suit of court, though he cannot sell the distress (Elton, 197; Litt. s. 226; *Co. Lit.* 151 a).

Heriot service, which consists in the lord's right to seize the best beast or chattel of a tenant dying seised of an estate of inheritance, is recoverable by seizure or distress (Elton, 198; *Peter v. Knoll*, 1584, Cro. (1) 32).

Suit heriot being considered a kind of rent, the lord cannot seize, but must either distrain or bring an action for non-payment. A separate distress must be made for each suit heriot reserved (Elton, 199, 200; *Edwards v. Mosley*, 1739, Willes, 192).

In heriot custom the lord may not distrain except under a special custom; but as the property in the heriot vests in him immediately on the tenant's death, he may seize the heriot in any place (Elton, 203; *Parker v. Gage*, 1689, 1 Show. 80).

Rents of assize may be recovered by a lord by distress (*Co. Lit.* 150 b), even though the land be subject to a lease; and by 4 Geo. II. c. 28 the lord may distrain for them as if they had been reserved by lease (Elton, 211, 212).

The remedy by distress may also be used to recover by summary process rates, taxes, and tithes, and to enforce the convictions, penalties, and orders of justices. The following are the most important statutes on the subject:—By 43 & 44 Eliz. c. 2, s. 4, "poor rates and all arrears" are made so recoverable (see *Peppercorn v. Hofman*, 1842, 9 Mee. & W. 618). Under 12 & 13 Vict. c. 14, s. 5, justices have power to grant a distress warrant for the recovery of rates in arrear, unless the defaulter shows good excuse for non-payment, or that the rate is illegal; for if the rate be legal, however oppressive it may be, justices are bound to issue a warrant of distress (*R. v. Hasler*, 1834, 3 L. J. M. C. 56; *R. v. Boteler*, 1864, 33 L. J. M. C. 101).

Highway rates, and the costs of proceedings therein, are recoverable by distress in the same way as poor rates, under 12 & 13 Vict. c. 14, s. 1, and 13 & 14 Vict. c. 99, s. 5.

Taxes generally are recoverable by distress under 43 & 44 Vict. c. 19, s. 86 ("The Taxes Management Act, 1880"), which gives power to the collector to distrain upon messuages, lands, tenements, and premises charged

with the payment; and also to break open premises under warrant of the Land Tax Commissioners (see *R. v. Clark*, 1835, 4 L. J. M. C. 92).

Titles are recoverable in the same manner by distress under the "Tithe Commutation Act, 1836" (6 & 7 Will. IV. c. 71, s. 81; see also 54 Vict. c. 8, s. 1).

*Distress (to Enforce Orders, etc., of Courts).*—Besides the remedies of distress for arrears of rent and feudal services, distress of animals damage feasant, and distress for the recovery of rates and taxes, the term distress is used of certain forms of executive process issued by a Court to enforce its writ, order, or sentence (see *Mirror of Justices*, ed. 1893, 7 Seld. Soc. Pub. 13, 70). As to arrest of the person, *distringas* and *replevin* are superseded by arrest or ATTACHMENT and BAIL (*q.v.*). In the superior Courts distress is not a process in use, except in the case of the writ of *DISTRINGAS* (*q.v.*).

The powers of Courts of Quarter Sessions and of summary jurisdiction to enforce by distress a conviction or order (for costs or otherwise) in every instance depend invariably on statutory authority, whether the distress relates to the recovery of rates and taxes or money payable under orders of a civil nature, or of fines or penalties on convictions.

The levy of distresses by Courts of summary jurisdiction is regulated by the Summary Jurisdiction Acts. Under sec. 19 of the Act of 1848 (11 & 12 Vict. c. 43), and sec. 9 of the Act of 1879, where a conviction adjudges a pecuniary penalty or compensation, or an order directs the enforcement of recognisances or requires the payment of a sum of money (where the Act under which the conviction or order is made directs the levy of the amount by distress and sale or is silent as to the method of enforcement), the justices who make the conviction or order may issue a warrant of distress in writing under their hand and seal. They need not do so unless they have evidence that it will be fruitful (*R. v. German*, 1891, 61 L. J. M. C. 43). (The forms in use are prescribed by the Summary Jurisdiction Rules of 1886, 24, 25.) It is executed by the constables or other persons to whom it is directed, within the county or borough, for which the issuing justices act; or if no sufficient distress is there taken, within any other county or borough after endorsement by a justice thereof. The property subject to distress is the goods of the defendant, except the wearing apparel of himself and family, and to the value of £5 the tools and implements of his trade; and the distress may be sold five clear days after seizure, unless the defendant consents to an earlier sale or sooner pays the amount for which the distress was levied (42 & 43 Vict. c. 49, s. 21 (2)).

In the case of a conviction, the justices may either let the defendant go at large or commit him to prison till the result of the distress warrant is known (11 & 12 Vict. c. 43, s. 28); and in either event, if no sufficient distress is taken, may commit the defendant to prison (11 & 12 Vict. c. 43, ss. 21, 22; 21 & 22 Vict. c. 73, s. 5), subject to the limitations prescribed by sec. 5 of the Act of 1879. In the case of an order for the recovery of a sum as a civil debt, imprisonment cannot be awarded in default of sufficient distress, unless a Court of summary jurisdiction is satisfied that the defendant can satisfy or could, since the date of the order, have satisfied, the order (42 & 43 Vict. c. 49, s. 35). The course of procedure on these orders is by judgment summons under the Summary Jurisdiction Rules of 1886 (rr. 20-29). Certain orders of a civil nature do not fall within the category of civil debts, *e.g.* poor rates (*R. v. Price*, 1879, 49 L. J. M. C. 49; 47 & 48 Vict. c. 43, s. 10), and bastardy orders (42 & 43 Vict. c. 49, s. 54).

Whatever the nature of the application for commitment in default of

**distress,** a Court of summary jurisdiction can postpone the issue of the commitment warrant (42 & 43 Vict. c. 49, s. 21 (1)). Formal and minor defects in warrants of distress issued by justices having jurisdiction are now immaterial, and do not render the distress illegal (42 & 43 Vict. c. 49, s. 39 (4)).

[*Authorities.*—Gilbert on *Distress and Replevin*; Bullen, *Law of Distress*; Woodfall on *Landlord and Tenant*, 15th ed.; Oldham and Foster, *Law of Distress*, 2nd ed.; Foà on *Landlord and Tenant*, 2nd ed.]

**Distress Broker.**—The term “distress broker” is applied to the certificated bailiff who may distrain for a landlord (see **DISTRESS**, *ante*, p. 301).

**Distribution.**—*Distribution of Estate.*—As to the meaning of “assets,” the order in which they are applicable for the payment of debts, and the distinction between legal and equitable assets, see **ASSETS**. **EXECUTORS AND ADMINISTRATORS**; **MARSHALLING**. As to distribution *per stirpes* and *per capita*, see **WILLS**. Before a trustee distributes the trust fund he should ascertain who are the parties entitled to it, and, if necessary, require them to make out their titles. If their several rights are not clear, he should decline to act without the sanction and direction of the Court. Before distribution of the estate by executors or administrators, they should advertise for creditors and other claimants, as provided by Lord. St. Leonard’s Act, 22 & 23 Vict. c. 35, s. 29. Questions or matters of difficulty which arise may be determined under the present practice on originating summons, without the necessity of instituting an administration action (see **R. S. C.**, Order 55, r. 3, and **ADMINISTRATION ACTION**); and where it is uncertain to whom a fund belongs, or when it belongs to an infant, payment into Court may be made under the provisions of the Trustee Act, 1893 (see s. 42). Applications for orders on the further consideration of any cause or matter, where the order to be made is for the distribution of an insolvent estate, or the estate of an intestate, or of a fund among creditors or debenture-holders, are made in chambers in the Chancery Division (**R. S. C.**, Order 55, r. 2). In cases of difficulty, the further consideration of an action for administration of an insolvent estate may be in Court (*In re Barber*, 1886, 31 Ch. D. 665). Where some of the persons entitled to a distributive share of a fund are ascertained, and difficulty or delay has occurred, or is likely to occur, in ascertaining the persons entitled to the other shares, the Court or a judge may order or allow immediate payment of the ascertained shares without reserving any part to answer the subsequent costs of ascertaining the persons entitled to the other shares (**R. S. C.**, Order 65, r. 14 (c)).

As to the distribution of a bankrupt’s estate, see **BANKRUPTCY**.

As to the application of the assets of a company in a winding-up, and the distribution of surplus assets (if any), see **COMPANY**.

*Statutes of Distribution.*—The distribution of the personal estate of an intestate, after payment of his debts, is regulated by the Statutes 22 & 23 Car. II. c. 10 and 1 Jac. II. c. 17 (s. 7), commonly called the Statutes of Distribution. For the proportions in which the estate is distributable among the widow and children or other next-of-kin of the intestate, see *infra*, p. 310. It was provided by the Statute of Frauds, 29 Car. II. c. 3, that the Statute of Distribution should not extend to the estates of *feme*

*coverts*, whose husbands were entitled to the whole of their personal estates. The Married Women's Property Act, 1882, has not altered the devolution of the undisposed-of separate personality of a married woman, and on her death the right of the husband to the same accrues as if the separate use had never existed (*In re Lambert's Estate*, 1888, 39 Ch. D. 626). The peculiar customs of distribution which formerly obtained in London and York, and, it seems, in parts of Wales, were abolished by 19 & 20 Vict. c. 94. By the Intestates Estates Act, 1890, 53 & 54 Vict. c. 29, where the intestate dies without issue, his widow is entitled to his real and personal estates where their net value does not exceed £500, or to £500 part thereof, in addition to her share in the residue.

**Distribution of Business.**—For the distribution of causes and matters in the High Court of Justice among the several Divisions and judges, see Judicature Act, 1873, s. 33; R. S. C. Order 5, rr. 5, 9. See for the distribution of business among the conveyancing counsel of the Court, Order 51, rr. 9, 10; the taxing masters, Order 61, r. 3; the masters in chambers in the Queen's Bench Division, Order 54, rr. 13–16, and the headings CHANCERY DIVISION; CONVEYANCING COUNSEL; MASTERS OF THE SUPREME COURT; CHAMBERS (CHANCERY DIVISION); CHAMBERS, JUDGES'.

**Distributions (Statute of).**—This statute (22 & 23 Car. II. c. 10) was passed to compel the administrators to whom the personal estate of an intestate had been committed under 31 Ed. III. stat. 1, c. 11, to make a just and equal distribution of what remained after the payment of the "debts"—funeral and just expenses of every sort—of the deceased amongst his wife and children, or children's children, or next-of-kin. It was made perpetual by 1 Jac. II. c. 17, after being amended by that Act (sec. 7, as to the mother's interest), and explained by the Statute of Frauds (29 Car. II. c. 3, s. 24, as to the husband's interest).

The statute directs the administrator to account for the goods of the intestate (s. 1). This account can only be enforced by a creditor or beneficiary (cf. 1 Jac. II. c. 17) in an administration action (*q.v.*) in the Chancery Division (20 & 21 Vict. c. 77, s. 23, Judicature Act, 1873, s. 34). It provides that, for the protection of creditors, no distribution of the estate shall be made till a year from the death has expired, and further, for bonds being given by the beneficiaries, to secure the repayment of a rateable proportion of their shares, and of the costs, if the administrator be afterwards sued by a creditor (s. 5). Such bonds are not now required, since the administrator is protected against claims of which he had no notice by giving proper advertisements, under 22 & 23 Vict. c. 35, s. 29 (see EXECUTORS AND ADMINISTRATORS). The year's delay is only allowed for convenience. It does not prevent the beneficiaries' interests vesting (*Garthshore v. Chalie*, 1804, 10 Ves. 1; 7 R. R. 311).

The order of distribution directed by the statute is said to be, in the main, that provided by early English law and the old local customs (2 Black. Com. 492, 516; Williams on *Executors*, 9th ed., p. 1356); it, however, closely resembles that directed by Justinian's 118th and 127th novels; and in some cases the Courts have adverted to the civil law for assistance in determining cases unprovided for by the statute (*eg. Evelyn v. Evelyn*, 1754, 3 Atk. 762).

**The Husband's Interest.**—A husband is solely entitled both to a grant

of administration and to the whole beneficial enjoyment of his deceased wife's undisposed of personal property (*Humphrey v. Bullen*, 1737, 1 Atk. 458, Williams, p. 1358). The Statute of Frauds (s. 24) provided that the principal statute should not extend to the case of "*some covert*s that shall die intestate." The Married Women's Property Act, 1882, has made no difference to this (*In re Lambert's Estate*, 1888, 39 Ch. D. 625; *Surman v. Wharton*, [1891] 1 Q. B. 491; *Smart v. Tranter*, 1890, 45 Ch. D. 587).

*The Wife's Interest.*—The widow is entitled to one-third, if there are lineal descendants, and to one-half, if there are none (s. 3). But in the case of a man dying wholly intestate (*In re Twigg's Estate*, [1892] 1 Ch. 579) after September 1, 1890, without issue, his widow is entitled to all his real and personal estate if it do not exceed £500 in net value, and if it exceed such sum, then to £500 rateably out of the real and personal estate, in addition to her moiety of the residue of the personal estate (Intestate Estates Act, 1890, 53 & 54 Vict. c. 29).

The widow's claim under the Statute of Distributions may be barred by the terms of an antenuptial settlement (Williams, p. 1360), even though at the date of the settlement she was under age (*Earl of Bessingham v. Drury*, 1762, 3 Bro. P. C. 492; 4 Bro. C. C. 506 n; *Tompson v. Watts*, 1862, 2 John. & H. 291; cp. *Cooper v. Cooper*, 1888, 13 App. Cas. 88). And if she is entitled to a provision out of her husband's estate under a covenant or agreement made by him, her interest under the statute will be taken as in whole or part satisfaction of it (Williams, 1362; *Blandy v. Widmore*, 1716, 1 P. Wms. 324; *Garthshore v. Chalie*, 1804, 10 Ves. 1; 7 R. R. 311).

*Children and other Descendants.*—The phrase in the statute, "such persons as legally represent such children, in case any of the said children be then dead," has always been taken to mean descendants of the children (Williams, p. 1366, *Bridge v. Abbot*, 1791, 3 Bro. C. C. 225), in however remote descent (Williams, p. 1366). It does not include a son's widow (*Price v. Strange*, 1820, 6 Madd. 159).

The children take equally two-thirds if the wife survives, or the whole if she does not, the representatives, i.e. the descendants of a child who died before the intestate, taking the deceased child's share. The rule is the same though all the children are dead, so that the grandchildren take *per stirpes*, not *per capita* (*In re Ross' Trust*, 1871, L. R. 13 Eq. 286; *In re Natt*, 1888, 37 Ch. D. 517, *contra*, *Toller*, cited in Williams, p. 1377).

*Next-of-kin.*—If there are no descendants, the next-of-kin, i.e. the ascendants or collaterals, take equally one-half if the wife survives, or the whole if she does not. Relations by affinity are not "of kin," e.g. a mother-in-law or step-mother (*Rutland v. Rutland*, 1723, 2 P. Wms. at p. 216).

The rule is that only those take who are in the nearest degree of kindred represented by living persons at the death, with the exception that, if any brother or sister is living and their degree (i.e. the second) is the nearest in which there are survivors, then children of a deceased brother or sister are let in as if they were of the second degree.

The statute provides that there shall be no representation admitted among collaterals after the children of brothers and sisters of the intestate (s. 4; *Caldecot v. Smith*, 1683, 2 Show. 286). So that grandchildren of a deceased brother do not come in with their grand-uncles and uncles (*Pelt v. Pelt*, 1700, 1 Salk. 250).

The degrees of kindred are reckoned by counting every generation from the intestate up to the common ancestor, and also down thence to the



person in question. Thus grandfather and brother are both in the second, and great-grandfather and nephew in the third degree.

Besides the representation of deceased brothers and sisters allowed by the statute itself, three exceptions have been grafted upon the general scheme.

(a) The father takes in exclusion of the mother, who is of the same degree, because at the common law he would have taken her share, if arising *ex jure mariti*.

(b) The mother is admitted, as of the second degree, equally with brothers and sisters by the Statute 1 Jac. II. c. 17, or with their children, if they are all dead (*Stanley v. Stanley*, 1739, 1 Atk. 456), and whether the intestate has left a widow or not (*Keylway v. Keylway*, 1726, 2 P. Wms. 344).

(c) Brothers and sisters take before the grandfather, although of the same degree (Williams, 1381; *Evelyn v. Evelyn*, 1754, 3 Atk. 762).

Kindred of the half-blood rank with the others (*Smith v. Tracy*, 1776, 1 Mod. Ca. 209), and a child *en ventre sa mère* is taken as a child (*Wallis v. Hodson*, 1740, 2 Atk. 114).

*Hotchpot*.—The statute provides that in the distribution, a child who has received an estate by settlement from the intestate, or has been advanced by him in his lifetime, by a portion, shall be charged with the value of the estate or the amount of the portion (as to what is an advancement, see vol. 1, p. 157, and Williams, 1370). Lands which the heir (at the common law, or by custom, *Lutwyche v. Lutwyche*, 1735, Ca. t. Talb. 276) has from the intestate "by descent or otherwise," are not to be brought into hotchpot (s. 3), but a gift of money to spend in decorating a house might be an advancement within the rule (*Smith v. Smith*, 1801, 5 Ves. 721; 5 R. R. 22). The rule extends to the children of a deceased child (*Proud v. Turner*, 1729, 2 P. Wms. 560), but the advancement is only accounted for, for the benefit to children, e.g. not for that of the widow (*Kircudbright v. Kircudbright*, 1802, 8 Ves. 51, at p. 64; 6 R. R. 216; cp. *Meinertzen v. Walters*, 1872, L. R. 7 Ch. 670), and the rule does not apply where the intestate is a woman (*Holt v. Frederick*, 1726, 2 P. Wms. 356; *Bennet v. Bennet*, 1879, 10 Ch. D. 474).

[*Authorities*.—See the ordinary text-books on EXECUTORS AND ADMINISTRATORS, a list of which is appended to the article on that subject.]

**District Council.**—*Districts*.—Speaking generally, the whole of the area of England and Wales, that is not included in the metropolis, is divided into county districts (see COUNTY DISTRICT); and in each county district there may be a District Council. A county district must be either rural or urban: its size and boundaries depend mainly on the areas of antecedent unions and local boards. Whenever the area of any poor-law union lay wholly outside any urban sanitary district, it became in 1894, if all in the same county, a rural county district, governed by a rural District Council. If part of the area of a poor-law union lay within, and part without, an urban sanitary district, that part which lay outside all urban sanitary districts, if all in the same county, became in 1894 a rural county district, governed by a rural District Council. But out of six hundred and forty-nine unions, one hundred and eighty-one lay in more than one county. As to these, therefore, it was provided that the portion included in each county, if large enough to have not less than five district councillors, should at once become a separate rural district with a

separate District Council; if it would have less than five councillors, and no special order was made either by the County Council or the Local Government Board, it merged in the nearest county district of its own county. The area of any former urban sanitary district became in 1894 an urban county district; if a borough, it is governed by the City or Town Council of the borough; if outside a borough, by an urban District Council. But the districts which existed in 1894 have since been considerably modified by orders made by various County Councils under sec. 36 of the Local Government Act, 1894, a section which declares the intention of the Legislature to secure, so far as possible, that the whole of every parish shall be in the same county district, and the whole of every rural district within the same county.

*Urban and Rural Councils.*—The distinction between an urban and a rural District Council is important; as the Legislature has conferred on the former many powers—especially in sanitary matters—which a rural District Council does not necessarily possess. But the Local Government Board has power, if it thinks fit, upon the application of a rural District Council, or of the ratepayers representing one-tenth in value of the rateable property of the district, to confer upon a rural District Council, by either a general or a special order, all, or one or more, of the special powers of an urban District Council. And in one or two instances in which the Legislature has at different times purported to bestow similar powers on urban and rural District Councils, the language of the section dealing with rural bodies is wider and more general than that conferring such power on an urban authority (cp. sec. 25 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), with sec. 144 of the Public Health Act, 1875 (38 & 39 Vict. c. 55)).

The principal distinction, however, between a rural and an urban District Council is this: A rural District Council is not only the sole sanitary and the chief highway authority in its district, but its members are also necessarily poor-law guardians; they represent each his own parish on the Board of Guardians for the union. Guardians as such are not now elected for any parish in a rural district. But in an urban district the poor-law is still administered by the Board of Guardians of the union, which is independent of, and elected separately from, the urban District Council, and may consist of entirely different persons.

*Constitution.*—Every District Council, whether rural or urban, is a body corporate, designated by the name of "The Urban (or Rural) District Council of ——" (adding the name of the district, or, if there is any doubt as to that name, such name as the County Council direct). It may sue and be sued in that name; it has perpetual succession and a common seal; and may hold land for the purposes of its powers and duties without licence in mortmain (Public Health Act, 1875, s. 7; Local Government Act, 1894, s. 24, subs. 7). Any District Council may, with the sanction of the County Council, change the name of its district and thus its own name.

*Members.*—The number of members in a District Council varies with the size and the population of the district, but there must be at least one member for every constituent parish that has a population of not less than three hundred. All the members are now elected by the parishes; there are no longer any *ex-officio* or nominated members. A district councillor holds office for a term of three years. As a rule, one-third, as nearly as may be, of the members of every council go out of office on 15th April in each year, and new members are elected to fill their places; though in some districts, by special order, the whole body retires *en bloc* in every third

year, instead of one-third portion retiring each year. The electors are the parochial electors of each constituent parish, or of each ward, if the parish be divided into wards for such an election. The voting is by ballot. Each elector may give one vote and no more for each of any number of candidates not exceeding the number to be elected.

A woman, even a married woman, may be a district councillor; no property qualification is now requisite. No person is qualified to be elected a member of an urban District Council unless he or she is a parochial elector of some parish within the district, or has resided in the district during the whole of the twelve months preceding the election (Local Government Act, 1894, s. 20). But a rural district councillor is allowed greater latitude in the choice of his residence. He is only required to be either a parochial elector of some parish within the *union*, or to have resided in the *union* during the whole of the twelve months preceding the election; although a union is generally a much larger area than a rural district. This anomaly is caused by the way in which the Act is drafted. Sec. 24 of the Local Government Act, 1894, which deals with rural councillors, should have been made complete in itself; instead of that, it incorporates sec. 20, which deals with guardians of the poor. The Legislature never intended that a person living outside a district should be a councillor for that district. But the result is, that anyone who is qualified to be a guardian for a union is also qualified to be elected a member of every rural District Council comprised in the area of that union.

A candidate will be disqualified if he is an infant, or an alien, or has within twelve months been in receipt of parochial relief, or has within five years been convicted or adjudged bankrupt, or is interested in certain contracts with the council (see Local Government Act, 1894, s. 46). By the combined effect of the provisions of 5 & 6 Vict. c. 57, s. 14, and Local Government Act, 1894, s. 46, subs. 5, no person can be a councillor for any rural district who is engaged as the paid poor-law officer of any union or parish in England or Wales, wherever situated. But in the case of an urban district, there is no such disqualification, as an urban District Council has nothing to do with the administration of the poor law. The paid officer of one District Council may be elected a member of another, though not of the District Council which employs and pays him.

If, after election, a candidate refuses to serve on the council, or if, after serving a while, he resigns, he is liable to pay to the council a fine which is usually fixed at £20. But such fine will not be exacted if he was elected without his consent, or if he can satisfy the Local Government Board that he has good reason for resigning office, such as illness or necessary absence from the district. Any councillor who is absent from all meetings of the council for more than six months consecutively, except because of illness or for some other good reason approved by the council, thereby vacates his seat; and the council, after calling upon him for an explanation of his absence, may proceed to declare his seat vacant, with a view to the election of a successor (Local Government Act, 1894, s. 46).

*Chairman.*—The members elect their own chairman, who, if a man, and not personally disqualified by any Act of Parliament, is, by virtue of his office, a justice of the peace for the county in which the district is situate. If he has not already done so, he must take the oaths usually taken by a justice of the peace (except that as to estate) before he acts in that capacity. But if re-elected chairman, he need not take the oaths again (59 & 60 Vict. c. 22).

*Sanitary Powers.*—An urban District Council has all the powers formerly

possessed by an urban Local Board of Health; a rural District Council all the powers of a rural sanitary authority (but see Local Government Act, 1894, s. 25, subs. (5)). As to the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), this statute is divided into five parts. Part I. extends to all England, Wales, and Ireland, exclusive of the administrative county of London; Parts II., III., IV., and V. may be adopted by any urban District Council under the provisions of the Act; but a rural District Council may only adopt Part III., and that so far only as it is declared by the Act to be applicable to such an authority (but see ss. 5 and 50). Any District Council may adopt the Notification of Infectious Diseases Act, 1889 (52 & 53 Vict. c. 72, s. 2). District Councils are also the authorities under the Factory and Workshop Act, 1883, whose duty it is to supervise retail bakehouses (see 41 Vict. c. 16; 46 & 47 Vict. c. 53, s. 16; 58 & 59 Vict. c. 37, s. 27; and *BAKEHOUSE*, vol. i. p. 465). The council of any district abutting on a canal has also duties to perform, as to the registration and inspection of canal boats, under the Canal Boats Acts, 1877 and 1884 (see *CANAL*, vol. ii. p. 348).

*Highways.*—Every District Council, whether urban or rural, has all the powers, duties, and liabilities of a surveyor of highways appointed by the vestry under the Highway Act, 1835, and of the vestry itself under that Act or any Act amending the same (Public Health Act, 1875, s. 144; Local Government Act, 1894, s. 25, subs. (1)). The rural District Council of any district in which there formerly existed a Highway Board under the Highway Acts, 1862 and 1864, has also the powers and duties and liabilities of such a board; whether other District Councils have all the powers, duties, and liabilities of such a board seems doubtful. All Highway Boards have ceased to exist (Local Government Act, 1894, s. 25, subs. (1)). All main roads are vested in the County Council, except such as an urban District Council may elect to retain under their own control (Local Government Act, 1888, s. 11; and see secs. 145–148 of the Public Health Act, 1875; sec. 3 of the Highways Act, 1891 (54 & 55 Vict. c. 63), and *HIGHWAYS*). It is the duty of every District Council to protect all public rights of way, and to prevent, as far as possible, the stopping or obstruction of any such right of way, whether within its district or in an adjoining district in the same county, whenever such stoppage or obstruction would, in its opinion, be prejudicial to the interests of its district; it is also the duty of every District Council to prevent any unlawful encroachment on any roadside waste within its district (Local Government Act, 1894, s. 26, subs. (1)).

*General Powers.*—Any District Council may, with the consent of the County Council for the county within which any common land is situate, aid persons in maintaining rights of common where, in the opinion of the council, the extinction of such rights would be prejudicial to the inhabitants of the district. It may also, with the like consent, exercise in relation to any common within its district all such powers as may, under sec. 8 of the Commons Act, 1876 (39 & 40 Vict. c. 56), be exercised by an urban sanitary authority in relation to any common referred to in that section. Notice must be served upon the District Council of any application to the Board of Agriculture (see vol. ii. p. 185) in relation to any common within its district (Local Government Act, 1894, s. 26, subs. (2)).

The powers, duties, and liabilities of justices out of session in relation to—

- (a) the licensing of gang-masters;
- (b) the grant of pawnbrokers' certificates;
- (c) the licensing of dealers in game;

- (d) the grant of licences for passage brokers and emigrant runners;
- (e) the abolition of fairs and alteration of days for holding fairs;
- (f) the execution as the local authority of the Acts relating to petroleum and the protection of infant life;

when arising within a county district; and also the powers, duties, and liabilities of Quarter Sessions in relation to the licensing of knackers' yards within a county district, are by subsecs. 1 and 2 of sec. 27 of the same Act transferred to the District Council of the district. A rural District Council may enter into a contract with the Postmaster-General, indemnifying him against any loss occasioned by his providing extra postal facilities for the district (54 & 55 Vict. c. 46, s. 8). An urban District Council may adopt the Museums and Gymnasiums Act, 1891, and also the Public Libraries Act, 1892 and 1893 (54 & 55 Vict. c. 22; 55 & 56 Vict. c. 53; 56 Vict. c. 11). An urban District Council may also apply for, and obtain from the Local Government Board, all or any of the special powers, duties, and liabilities of a Parish Council (Local Government Act, 1894, s. 33; and see PARISH COUNCIL). As to the powers of a District Council to acquire land for allotments, to make by-laws, and to borrow money, see ALLOTMENTS, vol. i. pp. 229, 230; BY-LAWS, vol. ii. p. 315; and BORROWING POWERS, vol. ii. p. 220. See also the District Councils (Water Supply Facilities) Act, 1897 (60 Vict. c. 32).

**District Parish.**—This phrase was brought into existence by the Church Building Acts, under which (see ECCLESIASTICAL COMMISSIONERS) overgrown parishes may be divided for ecclesiastical purposes, and provision made for the religious needs of their numerous inhabitants. These Acts provide for doing this in different ways: (1) by dividing a parish into two or more distinct parishes; (2) by dividing it into *district parishes*, which for some purposes remain parts of the original parish, though for others they are separate entities; (3) by division into district chapelries; (4) by the creation of consolidated chapelries out of portions of two or more different parishes; and (5) by the erection and endowment of chapels without districts.

The Acts in question are numerous. The Short Titles Act, 1896 (59 & 60 Vict. c. 14), gives a pretty complete list of them under the headings "Church Building Acts, 1818 to 1884," and "New Parishes Acts, 1843 to 1884."

District parishes may be created by Order in Council, on the representation of the Church Building (now Ecclesiastical) Commissioners, and with the consent of the bishop of the diocese under an Act passed in the year 1818 (58 Geo. III. c. 45, s. 21). The churches of such districts are district parish churches for all purposes of ecclesiastical worship and performance of ecclesiastical duties (*ibid.* s. 24). These churches are perpetual curacies (*ibid.* s. 25). The formation of a district parish does not affect the endowments of the old parish. They continue to belong to its incumbent as if the parish had not been divided (s. 30). The inhabitants retain their right of burial in the churchyard of the old parish, until a burial ground is provided for the district parish (7 & 8 Geo. IV. c. 72, s. 2).

Marriages, christenings, churchings, and burials are to be performed in district parish churches, as if they were old parish churches (Act of 1818, ss. 27–29); and the fees belong to their incumbents (*Edgell v. Burnaby*, 1853, 8 Ex. Rep. 788). The incumbent of the parish church may, however, be paid compensation for being deprived of them (Act of 1818; s. 32).

District chapelries may be converted into district parishes for ecclesiastical purposes, or into district parishes (3 Geo. iv. c. 72, s. 16).

District parishes may also be founded with consent of the bishop and of the patron and incumbent of the old parish, where additional churches or chapels have already been built and endowed by individuals (5 Geo. iv. c. 103, ss. 16, 17; 1 & 2 Will. iv. c. 38, ss. 10, 11). So, also, where the income of a church has been augmented by QUEEN ANNE'S BOUNTY, the district may be created a district parish (1 & 2 Vict. c. 107, s. 10).

[*Authorities.*—See further Phillimore, *Eccl. Law*, 2nd ed., Part ix. ch. 6; Cripps, *Law of Church and Clergy*, bk. iii. c. 1.]

**District Registries.**—In order to facilitate the prosecution in country districts of legal proceedings, Her Majesty was empowered by sec. 60, of the Judicature Act, 1873, to establish, by Order in Council, district registries from which writs of summonses for the commencement of actions in the High Court might be issued, and other proceedings taken in such actions. The registrars to be appointed were to be registrars of County Courts or other local Courts; and by sec. 13 of the Judicature Act, 1875, power was given to appoint two persons to act as joint registrars. Every district registrar is deemed to be an officer of the Supreme Court, and he has all the powers of a master, and in the Liverpool and Manchester registries he has practically all the powers of a master of the Chancery Division.

Proceedings in these registries are regulated by Order 35, R. S. C., 1883. Unless otherwise provided or ordered, all proceedings begun in a district registry are to be continued therein down to final judgment (r. 1), and all pleadings and other documents requiring to be filed are to be filed in such registry (r. 19). Writs of execution may be issued, costs may be taxed (r. 4), as well as the following proceedings taken:—Leave to enter judgment under Order 16, rr. 50, 51; examination of judgment debtors, garnishee orders, charging orders *nisi*, and interpleader orders (r. 5). Originating summonses may be sealed and issued in the Liverpool and Manchester district registries (R. S. C., May 1887).

Applications to a district registrar are made in the same manner as in chambers, *i.e. ex parte*, or by summons (r. 7). An appeal lies from his decision to a judge (r. 9), and matters may be referred by him for the decision of the judge (rr. 8, 12).

In certain cases proceedings may be removed from a district registry to London. The defendant in the following cases is entitled as of right to an order for removal of the proceedings:—(1) Where the plaintiff in an action commenced by a specially indorsed writ does not, within four days after appearance has been entered, apply for an order under Order 14; (2) where the defendant has got leave to defend under Order 14; and (3) where the writ is not specially indorsed. In an Admiralty action *in rem* any person who may have duly intervened and appeared may also, as of right, have the action removed (r. 13). In other cases an action may be removed from a district registry on cause shown (r. 16), and on the other hand the COURT OR A JUDGE may make an order for an action commenced in London being removed into a district registry, if satisfied there is sufficient reason for doing so (r. 17).

[*Authorities.*—A list of the district registries which have been established is given in the *Annual Practice* for 1897, vol. i. p. 69; see also the notes to Order 35 in the same volume.]

**Distringas (Notice in lieu of).**—In order to restrain the transfer of stock or shares standing in the books of the Bank of England or of any public company, or the payment of dividends thereon, it was formerly the practice to issue a writ of *distringas*. Such writ was originally issued out of the Court of Exchequer, but by 5 Vict. c. 5, s. 5, the jurisdiction was transferred to the Court of Chancery, and, subsequently to the Judicature Act, was vested in the Chancery Division of the High Court. The writ was issued upon an affidavit filed by the applicant or his solicitor, stating that the applicant was beneficially interested in the stock. Such affidavit and the subsequent writ were instituted in a fictitious suit in which the applicant was plaintiff, and the bank or company in whose books the stock stood, the defendants. The writ was served upon the bank, etc., together with a notice that the object of it was to prevent the transfer of the stock, and the payment of the dividends, or as the case might be. Where the bank, etc., after being served with the writ and notice, received a request from the holder of the stock to allow the transfer, they were not authorised, without the order of the Court, to refuse to permit the transfer to be made, or to withhold payment of dividends for more than eight days. Consequently, on receipt of such request, the bank gave notice that an application for the stock or dividends had been made, and that unless an injunction was obtained, the *distringas* would be disregarded. (For the practice as to the writ, see *Dan. Ch. Pr.*, 5th ed., pp. 1540–1543; Consolidated Order 27.)

In the year 1880 the writ of *distringas* was abolished by virtue of R. S. C., April 1880, r. 21. That rule, and the subsequent rules of the same Order, are now incorporated with R. S. C. 1883, and form rr. 2–11 of Order 46. The present practice substitutes for the writ of *distringas* a notice in the prescribed form, which has to be filed in the Central Office, together with an affidavit, by the person claiming to be interested in the stock, setting forth his title. An office copy of the affidavit and a sealed duplicate of the notice must be served on the company sought to be affected (r. 4). Such service has the same effect against the company as a writ of *distringas* issued under 5 Vict. c. 5, s. 5 would have had against the Bank of England (r. 8).

A notice filed under r. 4 may be withdrawn by the person on whose behalf it was given, on a written request signed by him, or its operation made to cease by order, to be obtained by motion on notice, or by petition, or by summons at chambers duly served by any other person claiming to be interested in the stock sought to be affected by the notice (r. 9).

As under the old, so under the present practice, if the company during the continuance of the notice receives from the stockholder a request to permit a transfer of the stock or to pay the dividends thereon, the company are not authorised without the leave of the Court or a judge to refuse to permit the transfer to be made, or to withhold the payment of the dividends for more than eight days after the date of the request (r. 10).

It will be observed that the rules regulating the modern practice expressly refer to “the company” as the body holding the stock sought to be affected, that term being interpreted as including the governor and company of the Bank of England and any other public company, whether incorporated or not (r. 3). This is in accordance with the former practice, for though the Statute and Consolidated Order 27 in terms referred only to the Bank of England, it was usual to allow the writ to issue against any public company.

The effect of a writ of *distringas* and of the notice in lieu thereof is temporary merely, its object being to secure notice of any proposed dealing

with the fund being given to the person issuing the writ or lodging the notice (*Wilkins v. Sibley*, 1863, 4 Gif. 442; *Hobbs v. Wayet*, 1887, 36 Ch. D. p. 260, per Kekewich, J.). The person who puts on the *distringas* must, upon receipt from the company of notice that application has been made for transfer of the fund, take immediate steps to obtain a restraining order under 5 Vict. c. 5, s. 4 (see *In re Blacksley's Trusts*, 1883, 23 Ch. D. 549), or obtain an injunction against the person interested under 39 & 40 Geo. III. c. 36. Unless he obtains an order within the eight days mentioned in r. 10, the *distringas* is gone (see per Kekewich, J., *Hobbs v. Wayet* (*ubi supra*)).

[*Authorities*.—*Dan. Ch. Pr.*, 5th ed., pp. 1540–1543; Consolidated Order 27; *Dan. Ch. Pr.*, 6th ed., pp. 1629–1633; *Dan. Ch. Forms*, 5th ed., pp. 699–702; *Seton*, 5th ed., pp. 618, 619; *R. S. C.*, 1883, Order 46, rr. 2–11; *The Annual Practice*, 1897, pp. 872–875.]

**Ditch.**—A channel usually, if not always, artificially cut at the side of a highway or hedgerow to receive the surface drainage of the adjacent road, field, or land. It is not quite the same as either a drain or a water-course.

As such ditches are most usually formed by excavating soil and heaping it up to form a bank or boundary on which a hedgerow or fence is set, it is usually presumed that the soil of the ditch belongs to the person on whose soil the hedge or bank is. It is uncertain whether the presumption applies to a natural ditch (if such there be), or only to an artificial cut (*Marshall v. Tayler*, [1895] 1 Ch. 641).

Under the Highway Acts the road authority has power to make and cleanse ditches at the side of a highway (5 & 6 Will. IV. c. 50, ss. 67, 68; *Croft v. Rickmansworth Highway Board*, 1888, 58 L. J. Ch. 14),—a power which is concurrent with the power and duty of the adjoining occupier, neglect of which duty may render him liable as for a public nuisance (*Hawk*, P. C., bk. i. c. 32).

Under the Public Health Acts the local sanitary authority and any private person are given summary remedies against the owners and occupiers of land on which are ditches so foul or in such a state as to be a nuisance or injurious to health (38 & 39 Vict. c. 75, ss. 48, 91; 54 & 55 Vict. c. 76, s. 2 (b)).

**Diversion.**—The diversion of a stream which a riparian owner is entitled to have flow to him in its natural state is a tort for which an action is maintainable, though he may not have used and may not want to use the water. But a riparian proprietor may divert the water of a stream if he does not thereby appreciably diminish or interfere with the user of other riparian proprietors; he may also divert the water if he has gained a right to do so by prescription (see *Embrey v. Owen*, 1851, 6 Ex. Rep. 353; *Orr-Ewing v. Colquhoun*, 1877, 2 App. Cas. 839).

The taking and diverting of streams by public bodies for the purpose of constructing and supplying waterworks is, by sec. 6 of the Waterworks Clauses Act, 1847, put upon the same footing as the taking of lands under the Lands Clauses Act, 1845.

The diversion of highways in urban districts is, under sec. 144 of the Public Health Act, 1875, carried out in accordance with secs. 84–92 of the Highway Act, 1835. In rural districts the consent of the Parish Council



and of the District Council is required for the stopping or diversion of a public right of way (Local Government Act, 1894, s. 13).

Secs. 52-58 of the Railway Clauses Act, 1845, provide the conditions under which railway companies, in the exercise of their statutory powers, can divert roads.

[*Authorities*.—Coulson and Forbes, *Law of Waters*; Michael and Will, *Law relating to Gas, Water, and Electric Lighting*; Pratt, *Law of Highways*; Browne and Theobald, *Law of Railways*.]

**Dives Costs.**—This term, which was very fully discussed in *Carson v. Pickersgill*, 1885, 14 Q. B. D. 859, was formerly used to denote costs on the ordinary scale as opposed to pauper costs. Till the new rules of 1883 the general practice in the Chancery Courts was to give a successful pauper litigant the same costs that he would have been entitled to if he had not been a pauper, and the same rule was in general applied in the common law Courts till the decision in *Dooly v. Great Northern Ry. Co.*, 1854, 4 El. & Bl. 341; these full costs were known as "dives costs." The present rule applicable to paupers' costs (Order 16, r. 31) does not contain the words "dives costs"; it provides that costs ordered to be paid to a pauper litigant shall, unless the Court otherwise directs, "be taxed as in other cases," and on this rule it was decided in *Carson v. Pickersgill* (*supra*) that a successful pauper litigant was only entitled to costs out of pocket, and could not be allowed anything as remuneration to his solicitor or fees to counsel. The rule there laid down applies to all the divisions of the High Court (*Richardson v. Richardson*, [1895] Prob. 346), and in the House of Lords (*Johnson v. Lindsay*, [1892] App. Cas. 110).

**Divide.**—Where a testator desired his residuary estate to be divided between two persons, this was held to create a tenancy in common, so that, on the death of one of the legatees in the lifetime of the testator, his share, being undisposed of by the will, went to the testator's next-of-kin (*Peat v. Chapman*, 1750, 1 Ves. Sen. 542; see also *Booth v. Alington*, 1858, 27 L. J. Ch. 117).

The partial exemption from inhabited house duty given by sec. 13 of 41 Vict. c. 15, in respect of properties divided into and let in different tenements, and any of such tenements occupied for business purposes, applies only to houses let in separate and distinct tenements, each complete in itself, and not to rooms in a house (*Yorkshire Fire, etc., Insurance Co. v. Clayton*, 1881, 8 Q. B. D. 421).

**Divided Parishes Acts.**—The Acts generally referred to by this name are the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), the Poor Law Act, 1879 (42 & 43 Vict. c. 54), and the Divided Parishes and Poor Law Amendment Act, 1882 (45 & 46 Vict. c. 58). The necessity for these enactments arose from the fact that the boundaries of a parish bore no necessary relation to those of any other local government area, except the union. It frequently happened that a parish might be situated, partly in one county and partly in another, partly in one local board district and partly in another, partly in a borough and partly in a rural district. Moreover, the lands which composed a single parish were often widely separated from each other; detached portions of

a parish might be found at a considerable distance from each other, and entirely surrounded by other parishes. There were over 1300 such divided parishes when the first of these Acts was passed in 1876. This Act empowered the Local Government Board to make an order, either constituting each such isolated portion a separate parish, if it were of sufficient size, or, if not, amalgamating it with the parish in which it was locally included. The second Act—that of 1879—extended the operation of the first Act to cases in which part of a parish lay on one side, while the residue of the parish lay on the other side, of the boundary of a municipal borough or county, or of a river, estuary, or branch of the sea, or where part of a parish was so situate as to be nearly detached from the residue of the parish, or was otherwise so situate as to render the administration of the relief of the poor or the local government of such part in conjunction with the residue of the parish inconvenient. It also removed doubts as to the effect of an order under the Act on extra parochial places and highway districts. But not many orders were made by the Local Government Board under these two Acts. One-tenth in number and rateable value of the ratepayers of any parish affected by any proposed order had the power to object under sec. 2 of the Act of 1876. So in 1882 a third Act was passed, which enacted once for all that all detached portions of a parish which were wholly surrounded by another parish should merge in the parish which surrounded them and henceforward be deemed to be in the same county as that parish.

The same policy has been carried out more efficiently by later Acts. The Local Government Act, 1888, conferred on a County Council (or if more than one county was concerned, on a joint committee of the County Councils concerned) very wide powers of altering and defining the boundaries and of dividing and rearranging the area of any parish and county district (s. 57). The Local Government Act, 1894, expressly directs the County Council, so far as practicable, to secure that the whole of each parish shall be within the same administrative county, and within the same county district. If at the passing of this Act (March 5, 1894) any parish was situate in more than one district, rural or urban, the parts of the parish in each such district became at once separate parishes, unless the County Council for special reasons otherwise directed, or unless an order was made altering the boundaries of the district (Local Government Act, 1894, ss. 1 (3) and 36 (2)).

The Divided Parishes Act of 1876 also contained two very important provisions, raising the *status* of irremovability, if continued for three successive years, to the level of a settlement (s. 34), and abolishing derivative settlements except in the simplest cases (s. 35). As to the effect of these enactments, see POOR LAW.

**Dividend Warrants (Offences).**—1. The forgery, altering, uttering, and disposing of dividend warrants with intent to defraud, is a felony punishable under the Forgery Act, 1861, with penal servitude for life, or not less than three years, or imprisonment with or without hard labour for not over two years (24 & 25 Vict. c. 98, s. 2; 54 & 55 Vict. c. 69, s. 1). Clerks of the Bank of England or Ireland, who, with intent to defraud, knowingly make out or deliver dividend warrants payable at such bank for a greater or less sum than the person is entitled to receive on whose behalf the warrant is made out, are guilty of felony, and liable to penal servitude from three to seven years, or imprisonment *ut supra* (24 & 25 Vict. c. 98, s. 6; 54 & 55 Vict. c. 69 s. 1). A similar

provision is made as to clerks of the London County Council or their bankers, with reference to dividends on Metropolitan Board of Works or Council Stock (32 & 33 Vict. c. 102, s. 21).

2. For the purposes of the Larceny Act, 1861 (24 & 25 Vict. c. 69), "dividend warrants" fall within the definition of "Valuable Security" in sec. 1, and they are also valuable securities within the Post Office Acts. The effect of these enactments is to supersede the common law rule that CHOSSES IN ACTION (*q.v.*) cannot be stolen.

**Divisible Averments.**—Where an indictment contains in any given count a number of averments, some of which can, and the others cannot, be proved, the question arises whether the averments are divisible or essential. Where the averments proved are sufficient to constitute a felony or a misdemeanour, and the averments not proved, coupled with those proved, would constitute another felony or misdemeanour of the same kind but a more serious character, the averment not proved is held divisible from the rest, and verdict and judgment on the rest of the averments is valid. But apart from statutory provisions, it is not permissible to divide averments so as to find a defendant guilty of a felony on an indictment for misdemeanour, or *vice versa* (*R. v. Thomas*, 1874, L. R. 2 C. C. R. 141).

Thus on an indictment for murder the jury, though they may negative the existence of malice aforethought, may find a verdict of manslaughter (*R. v. Mackalley*, 1612, 9 Co. Rep. 67, b); and on an indictment for unlawful and malicious wounding, or unlawfully inflicting grievous bodily harm a verdict for common assault is good (*R. v. Taylor*, 1869, L. R. 1 C. C. R. 199); and on an indictment for publishing a libel, knowing it to be false, a verdict may lawfully be returned for publishing it without the *scienter* (*Boaler v. R.*, 1887, 21 Q. B. D. 284); and where perjury in a judicial proceeding is charged, if the proceeding turns out not to be judicial, the jury may return a verdict for the common law misdemeanour of taking a false oath (*R. v. Hodgkiss*, 1869, L. R. 1 C. C. R. 212). In another class of cases where the offence is charged as "forged and caused to be forged," or "published and caused to be published," or two distinct intents are charged cumulatively, the jury may negative one and find the other proved, and the conviction will be good. This has the effect of permitting alternative pleading, although in strictness it is not permissible. [See Archbold, *Cr. Pl.*, 21st ed., 242-246.]

The divisibility of averments is not now of any materiality with respect to civil pleadings.

**Divisible Contracts.**—The question whether the terms of a contract are separable, or whether the complete performance of his whole obligation by one party is a condition precedent to his right to relief for non-performance of some of the terms by the other party, depends upon the construction of the contract and the circumstances of the case. The test is, Does a failure to perform part of the contract "go to the root of the whole and substantial consideration for the other party's promise"? (*Mersey Steel Co. v. Naylor*, 1884, 9 App. Cas. 434, at p. 443, per Lord Blackburn; *Honck v. Muller*, 1881, 7 Q. B. D. 92; Sale of Goods Act, 1893, s. 11 (1)). As regards sales for delivery by instalments, see the Act, sec. 31, and the cases last cited. The question therefore is, in effect, the same as whether the terms of a contract are concurrent or precedent (see

**CONDITIONS, Precedent,** and the notes to *Portage v. Cole*, 1 Williams' *Saunders*, ed. 1871, p. 548, there referred to).

Thus the ordinary building agreement, under which the builder is to have leases of the houses when completed, is divisible (*Wilkinson v. Clements*, 1872, L. R. 8 Ch. 96; *Louther v. Heaver*, 1889, 41 Ch. D. 248). So is a contract for freight, notwithstanding that the ship is to take a full cargo (*Ritchie v. Atkinson*, 1808, 10 East, 295; 10 R. R. 307). And so generally, wherever the parties contemplate a piecemeal performance (*Odessa Tramways Co. v. Mendel*, 1877, 8 Ch. D. 235).

Lots sold separately at an auction to the same purchaser, *prima facie*, constitute distinct contracts (*Emmerson v. Heelis*, 1809, 2 Taun. 38; 11 R. R. 520; *Roots v. Dormer*, 4 Barn. & Adol. 77; Sale of Goods Act, 1893, s. 58 (i)).

Where the consideration is severable and apportionable, a partial failure of consideration gives the other party a right to recover an apportioned part of the price (Leake on *Contracts*, 3rd ed., 91), e.g. goods sold by weight (*Devaux v. Conolly*, 1849, 8 C. B. 640).

If the expressed consideration is as to a part which is divisible from the rest, impossible, unintelligible, or void for ambiguity, such part may be rejected, leaving the contract supported by the remainder (*Shackell v. Rosier*, 1836, 2 Bing. N. C. 634, at p. 646; *Guthing v. Lynn*, 1831, 2 Barn. & Ald. 232, an agreement to buy a horse, paying £5 extra if it proved lucky; *Thomas v. Thomas*, 1842, 2 Q. B. 851; Leake, p. 547). So if part of the promise is illegal, and the illegal part is severable from the rest, it may be rejected, leaving the contract enforceable (*Pickering v. Ilfracombe Rwy. Co.*, 1868, L. R. 3 C. P., per Willes, at p. 250; *In re Burdett*, 1888, 20 Q. B. D. at p. 314; *Baker v. Hedgcock*, 1888, 39 Ch. D. 520).

**Divisional Court.**—See APPEALS (vol. i. p. 277); SUPREME COURT.

**Divorce.**—Divorce, as an institution in the civil life of communities, dates back at least as far as the Mosaic dispensation, and, at the present time, forms part of the civil law of most nations. In some countries and States, as, for example, in Germany and some parts of America, it is granted with the utmost freedom and facility; while in other countries a dissolution of marriage can only be obtained by Act of Parliament or a decree of the pope. In Austria, for example, divorce has no place in the civil law (see *Ingham (otherwise Sachs) v. Sachs*, 1887, 56 L. T. 920).

In England and Wales the complete dissolution of the marriage tie could only be obtained (as it can in Ireland now,—see, e.g., *Westropp's Divorce Bill*, 1886, 11 App. Cas. 294) by Act of Parliament prior to January 1, 1858; but since that date, on which the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), came into operation, decrees of divorce have been granted upon petition to the Probate and Divorce Court, now, since the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 34), merged in the Probate, Divorce, and Admiralty Division of the High Court of Justice in England; and decrees are now obtainable, upon sufficient proof and upon the grounds defined by the statute, very expeditiously and at comparatively small expense.

By the law of England a distinction is drawn between the case of a husband, and the case of a wife who may come before the Court as petitioner for dissolution of marriage. This distinction has from time to time, since the institution of the Divorce Court in this country, been the

subject of considerable discussion and controversy, into the merits and ethics of which the limited space at our disposal does not permit us to enter. In most other countries no such distinction between the matrimonial rights of the husband and the wife is drawn.

Under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which applies only to England and Wales, the grounds upon which a divorce *a vinculo matrimonii* is obtainable are—(a) in the case of a husband, adultery of the wife; or (b) where the wife is petitioner, incestuous adultery (*i.e.* adultery with a person with whom, if the man were single he could not, by the laws of this country, contract a valid marriage), or bigamy coupled with adultery; or rape; or sodomy or bestiality; or cruelty coupled with adultery; or adultery coupled with desertion without lawful excuse for the space of two years and upwards. Although sec. 27 of the Act of 1857 does not, in terms, provide that a husband may present a petition for the dissolution of his marriage and obtain the full measure of relief, upon the ground that his wife has, since the date of the marriage, willingly suffered an act of bestiality to be committed upon her, there is at least one instance of such a petition having been allowed to be placed upon the file and brought on for hearing. Such cases must, however, from their nature, be extremely rare; and, in the particular instance referred to, no report is extant, as the judge (Sir James Hannen) found that the charge had not been made out. "Upon a reference to the same section of the Act of 1857, it will be seen that "bigamy" (*q.v.*) is to be taken to mean the "marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere." It is further to be explained that "cruelty" does not necessarily mean actual physical violence. The tendency has been, especially of late years, to extend, little by little, the doctrine of what is popularly, though somewhat paradoxically termed "legal cruelty," and the definition now adopted by the Courts is that the acts alleged must, in order to constitute the matrimonial offence of "cruelty," amount to injury, or the reasonable apprehension of injury, to life, limb, or health, bodily or mental (see *Russell v. Russell*, [1897] App. Cas.).

In regard to "desertion," it is also to be observed that the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), which, by sec. 2, abolished the penalty of attachment for non-compliance with a decree for restitution of conjugal rights, gave compensating pecuniary advantages (ss. 2, 3, and 4), and moreover provided a new remedy in sec. 5, by giving the petitioner, whether husband or wife, the right to plead such non-compliance as "desertion without reasonable cause," and to obtain a decree of judicial separation, with all the incidents attaching thereto, upon the ground of desertion; and, in the case of adultery on the part of a husband, the wife is allowed to sue forthwith for a divorce, upon the ground of such adultery, coupled with that statutory desertion. In proving cruelty, the evidence of the petitioner must be corroborated: the Court having adopted the invariable rule of practice not to act upon the unsupported testimony of a petitioner in this respect. On the other hand, the evidence of a petitioner alone is not infrequently accepted as proving desertion. In dealing with charges of adultery, the Court or jury are, more often than not, obliged to act upon inference, the cases in which the accused party is caught *in flagrante delicto* being far less common than those in which circumstantial evidence is given, from which the reasonable deduction may be drawn that the offence has, in fact, been committed. Even in cases

where bigamy is alleged and proved, it is necessary to adduce evidence of adultery (*Ellam v. Ellam*, 1889, 61 L. T. N. S. 338). In such cases as this, however, when once the bigamous marriage has been established to the satisfaction of the Court, it needs but comparatively slight further evidence of adultery, the natural and obvious inference being that persons who contract a bigamous marriage do so but with the main object of living together as man and wife.

Apart from a denial and traverse of the allegations of marital misconduct in a divorce petition, the proof of which in all cases lies upon the petitioner, the defences to such a petition are, in their nature, of two kinds—those which, if proved, constitute an *absolute bar* to relief, and those which are merely *discretionary bars*. The *absolute bars* are: connivance, condonation, collusion. The *discretionary bars* are: cruelty on the part of a petitioner; or such wilful neglect and misconduct on the part of a petitioner as, in the opinion of the Court or jury, has conduced to the misconduct alleged and proved against the respondent; or desertion by the petitioner without just cause; or adultery on the part of the petitioner; or unreasonable delay on the part of the petitioner in presenting or prosecuting the petition.

To deal shortly with each ground of defence *seriatim*:—*Connivance* is about the most serious countercharge that can be made against a married person, especially against a husband. It amounts to no less than an allegation that the misconduct (adultery) of the other party to the marriage has been actually compassed or brought about, or, at least, has been knowingly and wilfully permitted, by the petitioner. The strictest proof is required of so extremely grave a charge. *Condonation* is the blotting out or forgiving of the offence alleged and proved by the petitioner, with a full knowledge of the offence so condoned. Prior and full knowledge is essential to constitute condonation in law, for a person cannot reasonably be said to forgive that which he or she is not fully cognisant of. The authorities go to show, however, that condonation requires to be more strictly proved by a husband, who seeks to set it up in bar to his wife's claim to relief, than where pleaded by a wife against her husband. *Collusion* is the presenting or prosecuting of a petition for divorce, by arrangement or agreement between the parties, such arrangement or agreement being contrary to the law of this country, which, unlike some foreign countries, does not permit divorces to be granted by what amounts practically to consent. Anything which savours of collusion is most strictly inquired into and dealt with by the judges of to-day (see *Churchward v. Churchward*, [1895] Prob. 75). The *discretionary bars*, from their nature, and by the light of what we have already said, may be left to speak for themselves, with these two additional remarks, that the length of delay, which is to be considered sufficient to bar a petitioner's claim to relief, which, apart from such delay he or she would be entitled to, is absolutely within the discretion of the Court, having regard to the circumstances of the particular case, and of the parties before it; and, in respect of adultery on the part of a petitioner, while the Divorce Act, 1857 (20 & 21 Vict. c. 85, s. 31), places this offence within the category of discretionary bars, the Courts have, in practice, treated it more in the light of an absolute bar, and have refused, and still refuse, to grant a decree of divorce in such cases, unless satisfied that the adultery has been committed under a *bona fide* though erroneous view of the law, or under very exceptional and excusable circumstances (see *Symons v. Symons, the Queen's Proctor intervening*, [1897] Prob. 167).

The onus of proving the defences alleged in answer to a petition lies

upon the party setting them up, but it is the duty of the Court to take cognisance of connivance or condonation, though not pleaded (*Matrimonial Causes Act, 1857, s. 29*), if it should appear in the course of the hearing or trial that the petitioner has condoned or has been in any way accessory to the offences of which he complains. Furthermore, if, on the hearing or trial, the judge shall see fit for any cause which raises a suspicion that material facts have been or are being kept back from the knowledge of the Court, but where nothing has come to light at or before the hearing or trial, which may justify the judge in withholding from the petitioner a decree *nisi* for dissolution of the marriage, he may direct that the papers relating to the case be laid before the Queen's Proctor, who thereafter may take such steps, under the direction of the Attorney-General, as he may deem fit, and may, if so authorised, intervene in the suit and file his plea, showing cause why the decree *nisi* should not, in his view of the case, be made absolute. For a period of about two and a half years after the first Divorce Act came into operation, the decrees pronounced by the Court were final; but, from the 28th day of August 1860, the *Matrimonial Causes Act* of that year (23 & 24 Vict. c. 144) made the decrees thereafter pronounced in suits for dissolution of marriage decrees *nisi* or inchoate decrees, which, during a period of three months (now six months), unless for very special reasons the Court shortens this period (see 29 & 30 Vict. c. 32, s. 3), are liable to be challenged by any person, or by Her Majesty's Proctor as aforesaid. The Act of 1860, which was limited in its duration, was made perpetual by 25 & 26 Vict. c. 81. In practice, no member of the public ever intervenes on his own behalf, but the Queen's Proctor is made aware of the reasons which may be said to exist for stopping the final decree being pronounced. Until this decree absolute is pronounced, the parties remain, in the eye of the law, man and wife. If either party die before decree absolute, the decree *nisi, ipso facto*, falls, and is of no effect whatever. If the petitioner die, it cannot be revived or made absolute by the legal personal representatives of the petitioner. If between the date of the decree *nisi* and decree absolute, either of the parties to the marriage have sexual intercourse with any other person, this amounts, in law, to adultery, and is a ground for intervention by the Queen's Proctor to prevent the decree *nisi* being made absolute.

*Divorced Wife, Name of.*—On her marriage a woman takes her husband's name, and this name she retains after divorce, unless another name, *e.g.* her maiden name, has been so far acquired by repute as to obliterate the name she has acquired by marriage (*Fendall v. Goldsmid*, 1877, 2 P. D. 263). In that case the petitioner had obtained a divorce from her husband, and had subsequently remarried him after publication of banns in which she was described by her married name, although in the interval between the divorce and the remarriage—nearly a year and a half—she had usually passed by her maiden name. She afterwards applied to have the remarriage annulled, on the ground of the informality in the publication of the banns. The question was not finally determined, as the petitioner's counsel agreed that the petition should be dismissed, but the Judge Ordinary made the following observations on the question: "I am of opinion," he said, "that marriage confers a name upon a woman, which becomes her actual name, and that she can only obtain another by reputation. The circumstances must be very exceptional to render a marriage celebrated in the actual names of the parties invalid. It could only be where the woman has so far obtained another name by repute as to obliterate the original name."

**Service of Citation Abroad.**—No leave is required for the service of a citation out of the jurisdiction, but the time for appearance is extended in such a case (Oakley, *Divorce Practice*, 3rd ed., p. 36). As in the ordinary case, service must be personal, unless an order for substituted service is obtained. In some countries, however, owing to the provisions of their laws, there may be a difficulty in effecting personal service on a foreigner resident there; an unreported case is cited in Mr. Dixon's work on *Divorce Practice*, 2nd ed., p. 219, where, owing to certain restrictions on service in Switzerland, leave was given to serve a citation by registered letter. See SERVICE OUT OF THE JURISDICTION.

See further, articles on COSTS, vol. iii. p. 486; DESERTION OF WIFE AND CHILDREN; HUSBAND AND WIFE; JUDICIAL SEPARATION; LICENCE; MARRIAGE; NULLITY OF MARRIAGE; RESTITUTION OF CONJUGAL RIGHTS.

[*Authorities.*—Browne and Powles on *Divorce*, 6th ed.; 7th ed. in preparation; Dixon on *Divorce*, 2nd ed., 1891.]

**Do or Make.**—The words "do or make waste" in the Statute of Marlbridge (52 Hen. III. c. 23, s. 2) as well as in the Statute of Gloucester (6 Edw. I. c. 5) include permissive waste (Coke, 2 Inst. 145; see also *Woodhouse v. Walker*, 1880, 49 L. J. Q. B. 609).

**Do the Needful.**—Where a person against whom an award had been made directed a solicitor to act for him and "do the needful," it was held that these words empowered such solicitor to carry the whole award into effect, although his immediate business was to carry out only a part of it (*Dawson v. Lawley*, 1801, 4 Esp. 64).

**Dock.**—The legal rights and liabilities attaching to the ownership of docks will be found under HARBOURS. It seems only necessary here to refer to certain statutory enactments relating to docks. The Admiralty were empowered to draw a sum of £300,000 from the Consolidated Fund as a loan for constructing docks in British possessions in 1865 (28 & 29 Vict. c. 106). The Bank Holiday Acts extend to persons employed in docks (1871, 34 & 35 Vict. c. 17; 1875, 38 & 39 Vict. c. 13; 1876, 39 & 40 Vict. c. 36, s. 8). There are provisions of the criminal law which deal with the offences of setting fire to, or injuring, or stealing from docks and dock buildings (1861, 24 & 25 Vict. cc. 96 and 97). See also, as to offences, BARGE; CANAL.

**Dock Company.**—Dock companies are corporations generally created by special Acts, e.g. the London Dock Companies. Modern companies incorporate the Harbours, Docks, Piers, and Clauses Act, 1847. The principal legal rights and liabilities of such companies will be found under CARGO; HARBOURS; WAREHOUSEMEN.

**Dock Dues** are payments made to the owners of docks by the owners of ships using the docks, in proportion to the tonnage of the ship, and by owners of goods, viz. by shippers when they are entered at the custom-house. [*Scrutton, Charter-Parties.*]



**Dock Master.**—A dock master exercises an exclusive control and direction over the movements and navigation of vessels entering, using, or quitting the docks owned by the corporation whose servant he is. The dock authority, whether it be a corporation trading for profit, *e.g.* a dock company, or a public body having merely the power of levying tolls on shipping, using the port and applying them for the benefit of the port, *e.g.* the Mersey Docks and Harbour Board, is liable for the acts and defaults of its servants and for the proper condition of its docks (*Thompson v. N.-E. Rwy. Co.*, 1862, 2 B. & S. 106, owners of tidal dock and basin, following the law laid down in *Lancaster Canal Co. v. Parnaby*, 1839, 11 Ad. & E. 223, owners of a canal, and *Mersey Docks v. Gibbs*, 1866, L. R. 1 H. L. 93). A dock authority is thus liable for damage done to a ship by her executing the orders of the dock master or other dock official, *e.g.* grounding on an uneven bottom (*The Apollo*, [1891] App. Cas. 499; *Reney v. Magistrates of Kirkcudbright*, [1892] App. Cas. 264); and equally so if a vessel, while acting under the orders of a dock master, does damage to the property of any other person, *e.g.* collides with another ship (*The Bilbao*, 1860, Lush. 149). The shipowner will not be liable in such a case if he can show that the damage was entirely due to the act or default of the dock master (*The Cynthia*, 1876, 2 P. D. 52); but if the orders of the dock master are negligently executed, or proper precautions are not taken by those on board the ship, *e.g.* if the master has an insufficient crew on board in a gale, the shipowner is liable for any damage to other persons or their property resulting therefrom, even though the orders given by the harbour master be injudicious (*The Excelsior*, 1868, L. R. 2 Ad. & Ec. 268); and the fact of his vessel's taking the help of a tug belonging to the dock authority which offers its services, does not release him from his liability for damage done to another ship by his vessel while in tow of the tug (*The Belgic*, 1875, 2 P. D. 57). In order to make the dock authority liable for the acts and defaults of the dock master, it is also necessary that the orders given by him should be within the scope of his duty (*The Rhosina*, 1884, 10 P. D. 24 and 131).

**Dock Warrants** are warrants issued by a dock company under which delivery can be taken of goods put in charge of the dock company by a shipowner or a shipper. Under the Factors Acts, 1889, a dock warrant is expressly included in the definition of the phrase "document of title" used therein, as being "a document used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented" (s. 1 (4)); a pledge of it is deemed to be a pledge of the goods (s. 3); and the lawful transfer of it to a person as a buyer or owner of the goods, and its transfer by that person to another, who takes it in good faith and for valuable consideration, has the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu* (s. 10). This statute recognises the mercantile practice of treating dock warrants and certificates in all cases as transferring by indorsement the actual possession of the goods which they represent—existing certainly in 1815 (*Spears v. Travers*, 1815, 4 Camp. 251; *Zwinger v. Samuda*, 1817, 7 Taun. 264; 18 R. R. 476; *Lucas v. Dorrien*, *ibid.*: 278; 18 R. R. 480)—as legal in cases where a third person is the middleman between the owner and the buyer of the goods. But where the question is only

between the immediate parties to a contract, a dock warrant is not a document of title to the goods referred to in it, but only a mere offer or token of authority to receive possession of the goods; and it does not, like a bill of lading, pass the possession by indorsement to another person so as to prevent the seller of the goods stopping them *in transitu* (*M'Evans v. Smith*, 1849, 2 H. L. 309), unless (by analogy to other "warrants") an established custom to that effect is proved, which was in the contemplation of the parties to the contract (*Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, 1877, 5 Ch. D. 205). Two reasons for this difference between bills of lading and dock warrants are given by Lord Blackburn, namely—(1) in the case of the former the goods are at sea, and the purchaser who takes it has done all that is possible in order to take possession of the goods, while in the latter case the goods are on land and the person who receives the warrant can at once lodge it and so take actual or constructive possession of the goods; (2) bills of lading are ancient documents which may be subject to the law merchant, while dock warrants are of modern invention, and no custom of merchants relating to them has ever been established (*Contract of Sale*, 415). Even in the case of a contract effected through a factor or third party, a dock warrant is not negotiable in the same way as is a bill of exchange. The Factors Act does not do more than estop the owner of goods who has issued such a document from setting up his title to the goods as against the possessor of it, *e.g.* by claiming a lien, *viz.* the right to stop the goods *in transitu* (*Pearson Gee, Factors Act*, 33).

A dock warrant is included for stamp purposes in the expression "warrant for goods, meaning any document or writing being evidence of the title of any person therein named or his assigns or the holder thereof to the property in any goods . . . lying in any warehouse or dock upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods" (Stamp Act, 1891, s. 111 (1)); and the stamp duty payable on it is 3d. (*ibid.* schedule). For the effect of other "warrants" for goods, see WARRANTS.

Even in cases of sale of goods by a factor, a dock warrant may not be a document of title to goods; for there may be more than one given for the same goods, and then the person otherwise entitled to the goods will obtain delivery of them (*Imperial Bank v. London and St. Katherine's Docks Co.*, 1877, 5 Ch. D. 195). Nor will a dock warrant or delivery order supersede the real document of title to the goods, *e.g.* a bill of lading which is still a living instrument; thus where delivery warrants for goods were given to Barber, who sold the goods as a factor, and had advanced Abraham (the owner) £2000 on them, and had had the third part of the bill of lading indorsed to him, but Meyerstein had previously advanced £2500 on the same goods, and had the first and second parts of the bill of lading indorsed to him, Meyerstein was held entitled to satisfy his claim first, because the bill of lading was still in force as the document of title to the goods, owing to the fact that at the time of Meyerstein's advance there was a "stop" on the goods by a bank for advances as well as one by the master for freight (*Barber v. Meyerstein*, 1870, L. R. 4 H. L. 330).

[*Authorities.*—Blackburn, *Contract of Sale*, pt. iii. ch. ii.; Pearson Gee, *Factors Act*; Chalmers, *Sale of Goods Act*; Scrutton, *Charter-Parties*.]

**Documents, Discovery of.**—Discovery of documents is the proceeding by which one party to an action, in the first place, compels his opponent to disclose all documents in his possession or under his control, which are relevant to any issue in the action, and, in the second place, to produce them or some of them for his inspection, with liberty to take copies.

By the Judicature Act, 1875, all Divisions of the High Court possess the full powers of enforcing discovery which were formerly the special privilege of the Court of Chancery; though such powers are not exercised precisely in the methods, or according to the practice, formerly in vogue in that Court.

In any action, whether in the Chancery, Queen's Bench, or Probate, Divorce, and Admiralty Division, as soon as the defendant has delivered his defence (but not as a rule before—*British and Foreign Contract Co. v. Wright*, 1884, 32 W. R. 413), any party may, without filing any affidavit, or naming any particular document, apply to a master under Order 31, r. 12, for an order directing any other party to the action to disclose on oath all documents which are or have been in his possession or power, relating to any matter in question in the action. But he must pay for this privilege; before he makes the application, he must bring £5 into Court and place it to the "security for costs account," to abide further order (Order 31, r. 26). This is a useful precaution; it prevents unnecessary applications. On the hearing of the application, the master will order such disclosure only when, and only so far as, he deems it necessary either for disposing of the action or for saving costs. If he is satisfied that discovery is not necessary, he will refuse the application. If he is satisfied that discovery is not necessary at that stage of the action, he will adjourn the application (see r. 20). In other cases he will order either general discovery, or discovery limited to certain classes of documents, as he thinks fit. This order the party seeking discovery must serve on his opponent, together with a copy of the receipt for the £5 paid into Court. A plaintiff can obtain discovery under this rule from any necessary defendant (*Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124). And one defendant can obtain discovery of documents from his co-defendant if there be any issue or any right to be adjusted between them in the action (*Shaw v. Smith*, 1886, 18 Q. B. D. 193; *Alcoy, etc., Co. v. Greenhill*, 1896, 74 L. T. 345).

**General Discovery.**—Any party against whom a general order for discovery has been made, must make an affidavit, specifying all the documents material to the matters in dispute in the action which are or have been in his possession. He must describe them with particularity sufficient to identify them hereafter, should the Court think fit to order any of them to be produced (*Taylor v. Batten*, 1878, 4 Q. B. D. 85). His opponent, as soon as he learns of their existence, will of course wish to see them; so he must also specify which, if any, he objects to produce (Order 31, r. 13), and on what grounds he so objects. He must specify all material documents, whether he objects to produce them or not. Any document which he sets out he thereby admits to be material. He should pass over without mention every document which he honestly believes to be irrelevant. Every document which will throw any light on any part of the case is material and relevant, and must be disclosed. If some portion of a document or book is relevant and the rest not, he must specify which portions he admits to be relevant; he has the document or book in his possession; and he must therefore take upon himself the responsibility of stating on oath which parts do, and which do not, relate to the matters in

question (*Yorkshire Provident Co. v. Gilbert*, [1895] 2 Q. B. 148, 153). But discovery, and inspection too, are strictly limited to the matters in issue in the action. Thus, if either party has delivered particulars he will only be entitled to discovery of such documents as are relevant to the matters specified in such particulars (*ibid.*; *Hope v. Brash*, [1897] 2 Q. B. 188).

An affidavit of documents is generally in the form shown in Appendix B to R. S. C. 1883, No. 8. It has two schedules; and the first schedule has two parts. In Schedule I. Part 1 the deponent sets out the documents which he has in his possession and is willing to produce; in Part 2, the documents which he has in his possession and is unwilling to produce. In Schedule II. he sets out documents which he once had in his possession, but has not now. The reasons for which he refuses production should be stated in the body of the affidavit.

*Documents privileged from Production.*—The fact that a document was written on a privileged occasion in the special sense in which that term is used in actions of defamation, is no ground for refusing to produce it; it is not privileged from inspection (*Webb v. East*, 1880, 5 Ex. D. 23, 108). But there are five grounds on which production may be lawfully refused:

1. *Documents of Title.*—No party need produce any document which he can swear to relate solely to his own title to any real property, corporeal or incorporeal, and to contain nothing which tends to establish the title of his opponent (*Egremont Burial Board v. Egremont Iron Ore Co.*, 1880, 14 Ch. D. 158). If, however, the documents are material to his opponent's title, the deponent must produce them, even though he be a purchaser for value without notice (*Ind, Coope, & Co. v. Emmerson*, 1887, 12 App. Cas. 300). This class of privilege has been extended so as to protect every document which the deponent can swear to relate solely to his own case, and to contain nothing to assist his opponent's case or to impeach his own (*Bewicke v. Graham*, 1881, 7 Q. B. D. 400; *A.-G. v. Emerson*, 1882, 10 Q. B. D. 191; *Budden v. Wilkinson*, [1893] 2 Q. B. 432; *Frankenstein v. Garin*, [1897] 2 Q. B. 62).

2. *Documents prepared with a View to Litigation.*—Any document which is prepared by either party in order that his solicitor may advise him, or may submit it to counsel for his advice, is privileged from production, although it is alleged to contain a libel on his opponent (*London v. Blakey*, 1889, 23 Q. B. D. 332), and although it was prepared before the present or any litigation was contemplated (*Minet v. Morgan*, 1873, L. R. 8 Ch. 361). So are all opinions of counsel. Thus, a plaintiff suing *in forma pauperis* cannot be ordered to produce for inspection by the defendant the case laid before counsel under Order 16, r. 23, and his opinion thereon, even though he has made them exhibits to his affidavit filed in accordance with Order 16, r. 24 (*Sloane v. Britain Steamship Co. Ltd.*, [1897] 1 Q. B. 185). All briefs, draft pleadings, etc., are privileged from inspection, but not counsel's indorsement on the outside of his brief (*Walsham v. Stainton*, 1863, 2 Hem. & M. 1; *Nicholl v. Jones*, 1865, 2 Hem. & M. 588). So are all papers prepared by any agent of the party for the use of his solicitor for the purposes of the action, provided such action be then commenced, or at least imminent (*McCorquodale v. Bell*, 1876, 1 C. P. D. 471; *Southwark and Vauxhall Water Co. v. Quick*, 1878, 3 Q. B. D. 315; *Friend v. London, Chatham, and Dover Rwy. Co.*, 1877, 2 Ex. D. 437). And so generally are all documents which are called into existence solely for the purpose of assisting the deponent or his legal advisers in any actual or anticipated litigation. But the privilege does not extend to advisers who are not legal (*Slade v. Tucker*, 1880, 14 Ch. D. 824). And when in an action it is alleged with some show of reason

that the defendant has been guilty of a crime, or of fraud not amounting to a crime, communications between him and his solicitor relating to the alleged crime or fraud, or to its subject-matter, are not privileged from production, merely because they passed between solicitor and client, even though it be not alleged that the solicitor was a party to the alleged crime or fraud (*R. v. Cox & Railton*, 1884, 14 Q. B. D. 153; *Williams v. Quebrada, etc., Co.*, [1895] 2 Ch. 751).

3. *Incriminating Documents*.—It is also a ground of privilege that the documents, if produced, would tend to criminate the party producing them. But a party cannot refuse to make an affidavit of documents on the ground that he might thereby criminate himself. He must take the objection in the affidavit (*Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 130). He alone can raise the objection, and he must do so on oath and in terms clear and express. It is not sufficient for him to swear merely, "The production will, to the best of my information and belief, tend to incriminate me" (*Roe v. New York Press*, 1883, 75 L. T. Jo. 31). But no order for discovery of documents will apparently be made against the defendant in an action brought to recover possession of demised premises, on the ground of an alleged forfeiture by breach of covenant (*Earl of Mexborough v. Whitwood Urban District Council*, [1897] 2 Q. B. 111, overruling *Seaward v. Dennington*, 1896, 44 W. R. 696).

4. *Documents belonging to a third Person*.—No one can be compelled to produce documents which he holds merely as agent or trustee for another, if the true owner objects to their production. The steward of a manor may refuse to produce the court rolls, if the lord objects to their production. So if an action be brought against the secretary of a limited company, he will not be ordered to produce any document which is the property of the company, if the directors forbid him to do so. So, too, a solicitor who is a party to an action may refuse to produce documents of which he is in possession solely as solicitor for a client (*Procter v. Smiles*, 1886, 2 T. L. R. 474; *Ward v. Marshall*, 1887, 3 T. L. R. 578). But no privilege can be claimed for private letters written to the deponent by a stranger to the suit, even though they are expressed to be written in confidence, and the writer forbids their production (*Hopkinson v. Lord Burghley*, 1867, L. R. 2 Ch. 447; *McCorquodale v. Bell*, 1876, 1 C. P. D. 471).

5. *State Documents*.—Sometimes, also, production is refused on the ground of public policy and convenience. This can only be where one party to the suit is officially in possession of State documents of importance. If the defendant be a subordinate officer of a public department sued in his official capacity, he cannot, on his own authority, claim privilege on the ground of public policy; production can only be refused on that ground by the head of the department (*Beatson v. Skene*, 1860, 5 H. & N. 838; 29 L. J. Ex. 430). But it is not necessary that the head of the department should himself make an affidavit; so long as it is made clear to the Court that the mind of the responsible person has been brought to bear upon the question, the objection will be upheld (*Kain v. Farrer*, 1877, 37 L. T. 469; *H.M.S. Bellerophon*, 1874, 44 L. J. Ad. 5; *Hennessey v. Wright*, 1888, 21 Q. B. D. 509; *Ford v. Blest*, 1890, 6 T. L. R. 295).

*Further and better Affidavit*.—If an affidavit of documents be drawn up in proper form, it is, as a rule, conclusive; and no affidavit in reply thereto will be permitted. If, however, it can be shown from the affidavit of documents itself, or from the documents disclosed in it, or from any admission on his pleadings, that the deponent has in his possession other material documents which he has not disclosed, a further affidavit will be

ordered (*Welsh Steam Coal Collieries Ltd. v. Gaskell*, 1877, 36 L. T. 352; *Johnson v. Smith*, 1877, 25 W. R. 539; 36 L. T. 741).

*Discovery of Particular Documents.*—There are two cases in which a party can obtain partial discovery without putting his opponent to the trouble, or himself incurring the expense, of a general affidavit of documents.

(i.) It may be that one party has in his pleadings, particulars, or affidavits referred to some document; and he cannot say that it is not material, as he relies on it himself. His opponent is, in that case, entitled, without filing any affidavit or making any payment into Court, at once to give notice under Order 31, r. 15, that he will call and see that document, and take a copy of it, if he deems it sufficiently material. And the party who has referred to the document must produce the document, if he has it at the time named in the notice; if he does not, he cannot himself put it in evidence at the trial, unless he can satisfy the judge that he had some sufficient reason for not producing it. This rule applies, even though the affidavit has never been filed (*Fenner v. Lord*, [1897] 1 Q. B. 667; and see rr. 16, 17, 18).

(ii.) In the second place, it may be that one party knows or thinks he knows that the other has certain material documents in his possession, though they are not referred to in any pleading, particular, or affidavit. In such a case he may now file an affidavit stating his belief, specifying the particular documents, and showing that they are material. Upon this the master will order his opponent to state on affidavit whether he has or ever had any of those documents in his possession or power, and if he ever had one of them and has not now, when he parted with it, and what has become of it (Order 31, r. 19 *a* (3)). If in this affidavit he admits that he has any of the documents specified, and that it is material, it becomes at once a document referred to in an affidavit within the preceding paragraph, and r. 15 of Order 31 applies to it.

*Production and Inspection.*—A master at chambers may at any time during the pendency of any cause or matter order the production by any party thereto on oath of such of the documents in his possession or power relating to any matter in question in such cause or matter as the master shall think right; and may deal with such documents when produced in such manner as shall appear just (Order 31, r. 14). The party producing any book or document may seal or cover up any part which he can swear is not material to any issue in the action (*Graham v. Sutton & Co.*, [1897] 1 Ch. 761). No one will be compelled to produce a document which is not relevant to any issue in the action, even though he has disclosed it in his affidavit (*Hope v. Brash*, [1897] 2 Q. B. 188). It is not an answer to an application for production of documents that they are in the hands of the deponent's former solicitors, who claim a lien on them for costs, and that he disputes the bill; but the order for production will contain liberty to apply in case he really cannot obtain the documents (*Lewis v. Powell*, [1897] 1 Ch. 678). In a proper case (*e.g.* where one party denies that he wrote an important document which purports to be in his handwriting), the master will order the party in possession of the document to permit his opponent to take photographic or facsimile copies of it—of course, at his own expense (*Davey v. Pemberton*, 1862, 11 C. B. N. S. 628; *Lewis v. Earl of Lonsborough*, [1893] 2 Q. B. 191).

Under rule 18 of the same order the master may make an order for the inspection of any document in such place and in such manner as he may think fit, provided such inspection be necessary for disposing fairly of the action or will save costs. It is on an application under this rule that

the validity of any claim of privilege from inspection is generally tested. The judge may now himself in every case inspect the document if he thinks fit (r. 19 a (2); *Ehrmann v. Ehrmann*, [1896] 2 Ch. 826). Otherwise the only question is whether the deponent has in his affidavit said enough about the document for which he claims privilege to entitle him to refuse production (per Lindley, J., in *Kain v. Farrer*, 1877, 37 L. T. 471). Any party to the action may also be ordered to attend at any stage of the proceedings for the purpose of producing any document named in the order (Order 27, r. 7; *Straker v. Reynolds*, 1889, 22 Q. B. D. 262; *Elder v. Carter*, 1890, 25 Q. B. D. 194). See further the following headings:—ADMISSIONS (vol. i. p. 148, as to *notice to admit*); DISCOVERY (as to general principles of discovery); EVIDENCE (as to distinction between public and private documents, what may be proved by documents, and primary and secondary evidence of private documents); PUBLIC RECORDS AND DOCUMENTS (as to mode of proof, etc., of such documents).

[*Authorities*.—See list of authorities appended to DISCOVERY and to the other articles above referred to.]

### Documents of Title.—See PRINCIPAL AND AGENT.

**Dogs.**—The law as to dogs has had a somewhat curious history and development. It falls under three heads:—

1. The ownership of dogs, and the remedies, civil and criminal, for interference therewith.
2. Liability of owners for trespass and other injuries committed by their dogs.
3. Public regulations for the licensing and control of dogs.

1. At common law dogs were regarded as of a base nature, and not sufficiently subjects of private *ownership* to be the subjects of larceny; for which result the reason was said to be that however they are valued by the owner, yet they shall never be so highly regarded by the law that for the sake of them a man shall die (Hawk., P. C. bk. i. c. 35, s. 36). Stealing the skin of a dead dog seems, however, to have always been larceny (see *R. v. Holloway*, 1823, 1 Car. & P. 127 n.). But in 1770 (10 Geo. III. c. 18) dog-stealing was made an offence punishable summarily. The law on this subject is now contained in the Larceny Act, 1861 (24 & 25 Vict. c. 96). Stealing a dog, or unlawfully having in possession, or on the defendant's premises, a stolen dog or the skin of a stolen dog, is punishable by a Court of summary jurisdiction either by imprisonment with or without hard labour for not over six months, or by an order to forfeit and pay the value of the dog, and also a sum not exceeding £20 (ss. 18, 19). The forfeiture is enforceable under 42 & 43 Vict. c. 49, ss. 5, 21, 47. Stealing a dog, or unlawfully having one in possession, etc., after a previous conviction before or since 1861 of dog-stealing, is a misdemeanour triable at Quarter Sessions, and punishable by imprisonment with or without hard labour for not over eighteen months, and (or) fine and sureties (24 & 25 Vict. c. 96, ss. 18, 19, 117; 5 & 6 Vict. c. 38, s. 1).

The offender may elect to be tried by a jury (42 & 43 Vict. c. 49, s. 17). If the forfeiture imposed exceeds £5, or the imprisonment exceeds one month, in accordance with the Summary Jurisdiction Act, 1879, the defendant may appeal to Quarter Sessions (24 & 25 Vict. c. 96, s. 110; 42 & 43 Vict. c. 49, s. 31).

Corruptly taking any money or reward, directly or indirectly, under pretence, or upon account of aiding any person to recover a dog which has been stolen, or is in the possession of a person not its owner, is a misdemeanour triable and punishable as in the preceding case (24 & 25 Vict. c. 96, ss. 20, 117; 5 & 6 Vict. c. 38, s. 1). The provisions of sec. 21 as to stealing, or taking with intent to steal, animals not the subject of larceny at common law, are in terms wide enough to include dogs, but do not seem to be meant to apply to them; but the powers of justices under sec. 22 to restore to the owner such animals or their skins, or any part of them found in the possession or on the premises of any person, are expressly applied to dogs, and give a summary remedy for the recovery of the animal alive or dead. The owner of a dog has always been entitled to maintain trover for its recovery, even if it has strayed, nor is the finder entitled to detain it till paid for its keep (*Binstead v. Buck*, 1777, 2 Black. W. 1117). A person who maliciously kills, maims, or wounds a dog is punishable on summary conviction, for a first offence, by fine not exceeding £20 beyond the amount of the injury, and, in default of payment, by imprisonment; and for a second or subsequent offence may be summarily convicted and imprisoned, with or without hard labour, for not over twelve months (24 & 25 Vict. c. 97, s. 41; 42 & 43 Vict. c. 49, ss. 5, 21, 47). On a charge of a second offence the defendant may elect to be tried by a jury (42 & 43 Vict. c. 49, s. 17). Catching a dog in a trap is not an offence against this enactment (*Bryan v. Eaton*, 1876, 40 J. P. 213), nor is poisoning a dog, unless the poison was laid in a building or enclosed garden only for the destruction of small vermin (*Daniel v. Jones*, 1877, 2 C. P. D. 351; 27 & 28 Vict. c. 115); and the setting of dog spears, while not absolutely prohibited as a means of destroying dogs, is practically rendered unlawful, as they are calculated to inflict bodily harm on men (24 & 25 Vict. c. 100, s. 31); but see *Jordin v. Crump*, 1841, 8 Mee. & W. 782; Oke, *Game Laws*, 4th ed., 117.

2. *Trespasses and Injuries by Dogs*.—A dog found on a man's land trespassing and doing damage may be distrained *damage feasant* (see *DISTRESS ante*, p. 306); which gives a mere lien for the damage (*Boden v. Roscoe*, [1894] 1 Q. B. 608); but may not be killed unless it is actually doing damage to the freehold or animals thereon, and unless the killing is necessary to prevent the damage or its recurrence (*Vere v. Cawdor*, 1809, 11 East, 568; 11 R. R. 268; Beven, *Negligence*, 2nd ed., 641). Where a dog trespasses on a manor or free warren, the lord or his delegates may seize and kill it (1 & 2 Will. IV. c. 51, s. 13; *Kingsworth v. Bretton*, 1814, 5 Taun. 416). But, as a general rule, the owner of a dog is not liable for any damage done by it on land, unless it trespasses by his consent, or on his incitement, or, knowing its propensities, he suffers it to be at large.

If a dog bites a human being the owner is not liable (1) if the person bitten is a trespasser (*Sarch v. Blackburn*, 1833, 4 Car. & P. 297); (2) if the owner or occupier of the premises to which the dog resorted did not know that the dog was accustomed to bite mankind. This rule is sometimes phrased that a dog is entitled to have his first bite. Very slight evidence of *scienter* or past ferocity is accepted. If a dog bites sheep or cattle (including horses, *Wright v. Pearson*, 1869, L. R. 4 Q. B. 582; 28 & 29 Vict. c. 60; *Grange v. Silcock*, 1897, 13 T. L. R. 565), the owner is absolutely liable for the damage, irrespective of *scienter*, except, perhaps, when the owner, assisted by the dog, is driving off trespassing animals, and the damage can be recovered summarily.

Dogs are specifically mentioned in the Cruelty to Animals Act, 1849,



12 & 13 Vict. c. 92, and it is an offence punishable on summary conviction by fine not exceeding £5, with imprisonment in default of payment, or imprisonment without the option of a fine with or without hard labour for not over three months (12 & 13 Vict. c. 92), to cruelly beat, ill-treat, abuse, or torture a dog, or to cause it to suffer any such act or treatment. A single justice cannot impose imprisonment (12 & 13 Vict. c. 92, ss. 2, 18, 29; 42 & 43 Vict. c. 49, ss. 5, 21, 49). It is an offence within the section to dock a dog's tail or ears; but apparently not to shoot a trespassing dog (*Powell v. Knight*, 1878, 38 L. T. 607).

A conviction is no bar to proceedings by the owner for compensation for the injuries done, which may be awarded up to £10 by the justices (12 & 13 Vict. c. 92, s. 4) or recovered by action.

It is illegal to use a dog as a draught animal (2 & 3 Vict. c. 47, s. 56; 17 & 18 Vict. c. 60, s. 2).

3. To entitle a person to *keep* a dog it is necessary to have an annual excise licence, which costs 7s. 6d. The following exemptions are allowed to this obligation:—

(a) Dogs under six months old (30 & 31 Vict. c. 5, s. 10).

(b) Hound puppies under twelve months not entered in or used with a pack of hounds, where the owner or master of the pack has taken out proper licences for all the hounds entered in the pack (41 & 42 Vict. c. 15, s. 20).

(c) One dog kept *and used* solely by a blind person for his guidance (41 & 42 Vict. c. 15, s. 21).

(d) Dogs kept *and used* solely for the purpose of tending sheep or cattle, or in the exercise of the occupation of shepherd. The exemption is only allowed on certificate issued by the Inland Revenue after receipt of a declaration in the prescribed form by the person seeking exemption, and is limited to two dogs, except in the case of sheep farmers owning over 400 sheep feeding on common or enclosed land, in which case a third dog is allowed, a fourth if the sheep amount to 1000, and an additional dog up to eight dogs for every 500 sheep above a 1000 (41 & 42 Vict. c. 15, s. 22).

There is no appeal from refusal of a certificate of exemption, and justices cannot review it in any way (*Phillips v. Evans*, [1896] 1 Q. B. 305; and see Oke, *Game Laws*, 4th ed., 82).

The licences are under the control of the Inland Revenue Department, which prescribes their form and regulates their issue and receives and accounts for the duty (30 & 31 Vict. c. 5, ss. 4, 5, 7). But they are usually obtained at post offices. Persons authorised to grant licences must keep a register of the persons licensed, and the number of dogs in respect whereof they are licensed, which is open to the inspection of justices and constables (30 & 31 Vict. c. 5, s. 6). The licence is stamped with the day and hour of issue, but is not retrospective. Whenever granted, it expires on 31st December; nor is any rebate allowed if the licence is taken out after 1st January (30 & 31 Vict. c. 5, ss. 4, 5; 41 & 42 Vict. c. 15, s. 22). It does not apply to a particular dog, and is not transferable with the dog for which it was in fact taken out.

In the interest of the Revenue the following offences as to licences are created:—

(1) Keeping a dog without a licence, *i.e.* without a licence at the hour when the offence was detected (*Campbell v. Strangeways*, 1877; 3 C. P. D. 105);

(2) Keeping more dogs than one is licensed to keep; and

(3) Refusing to produce and deliver a licence, within a reasonable time after demand, to an excise officer or constable.

All these offences are punishable under the Excise Acts, or on summary conviction at the instance of a constable, by a penalty not exceeding £5, or by imprisonment in default of distress (30 & 31 Vict. c. 5, ss. 8, 9; 41 & 42 Vict. c. 15, s. 23; 42 & 43 Vict. c. 49, ss. 5, 21, 47). The penalty can be mitigated (42 & 43 Vict. c. 49, s. 4), and in the case of a first offence to less than one-fourth. Costs can be awarded on a police prosecution. (*Murray v. Thompson*, 1889, 22 Q. B. D. 142).

It is suggested (Atkinson, *Mag. Pr.*, 1897, 306) that on an excise prosecution the summons must, under 4 & 5 Will. IV. c. 51, s. 19, be served ten days before the hearing, and (Oke, *Game Laws*, 4th ed., 84) that costs can be awarded only on a police prosecution.

The person in whose custody, charge, or possession, or on whose premises an unlicensed dog is found or seen is deemed the owner, unless he can prove the contrary; and the owner or master of hounds is deemed to keep them (30 & 31 Vict. c. 5, s. 8). Proof of the age of a dog lies on the defendant (41 & 42 Vict. c. 15, s. 19).

Dogs may not be used for taking or killing game without a game licence.

See Oke's *Game Laws*, 4th ed., p. 56, and GAME.

Under the Dogs Act, 1871 (34 & 35 Vict. c. 56), provisions are made for dealing with stray dogs and dangerous dogs. Dogs astray on a highway which a constable has reason to suppose savage or dangerous may be detained by him, and after notice to the owner, if he is known, may, after an interval, be sold or destroyed, and the proceeds of sale carried to the account of the police rate of the district (s. 1; see *Pickering v. Marsh*, 1874, 43 L. J. M. C. 143). On complaint that a dog is dangerous, a Court of summary jurisdiction may order it to be kept under proper control or destroyed, and a penalty of 20s. *per diem* is incurred by disobedience to the order (s. 2). Where danger from mad dogs is apprehended, the local authority (*i.e.* county, borough, or district council) may make and enforce orders placing restrictions on all dogs not under control for such time as they may prescribe (s. 3); and the Board of Agriculture can, under the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57, s. 22), make orders for prescribing and regulating the muzzling of dogs and keeping dogs under control, and for prescribing the seizure, detention, and disposal, including slaughter, of stray dogs, and of dogs not muzzled, and of dogs not being kept under control, and for the recovery from owners of dogs of the expenses incurred in respect of their detention. See, too, Ord. in Coun., 15 Sept. 1897.

All these powers run concurrently with those given in particular areas by local Acts, and in the metropolitan police district with the powers of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134, s. 18), and the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47, ss. 54, 61).

**Dole.**—The name sometimes given to the share of a person in a common meadow, which is divided yearly among the whole body of commoners by lot. [*Elton, Commons and Waste Lands*, 31; *Elphinstone, Interpretation of Deeds*, 573.]

**Domestic Tribunals.**—A term sometimes employed to denote the power which certain public bodies have to decide questions relating to their internal affairs without interference by the Courts. The term has

been a good deal used in connection with joint-stock companies, in the case of which, where the claims of creditors are not in question, the Legislature has by sec. 79 (1) and sec. 129 (2) of the Companies Act, 1862, constituted the general body of shareholders a domestic tribunal for deciding whether a winding-up should take place or not; and it is only in exceptional circumstances that the Court will disregard the wishes expressed by the majority of the shareholders. In *In re Langham Skating Rink Co.*, 1877, 5 Ch. D. 669, Sir George Jessel, M. R., said (p. 684): "These companies are governed by a majority of their own members, and where there is a domestic tribunal which has power to decide upon a question, it should, if possible, be left to that domestic tribunal. . . . The shareholders have an absolute power of saying by a majority of three-fourths whether the company shall go on or not, and a majority, without being a majority of three-fourths, can elect directors, or direct the presentation of a petition, which would, no doubt, receive every attention from the Court." So also in *In re Gold Company*, 1879, 11 Ch. D. 701, James, L.J., said at p. 710: "I cannot find anything in this case to satisfy the Court, or to entitle the Court to say, that it can deprive those shareholders . . . of the right which belongs ordinarily, and except under very exceptional circumstances, to the shareholders of every joint-stock company or corporation of this kind, of determining amongst themselves, for themselves, by a majority, according to their view of what is most for their interest, what ought to be done or ought not to be done, either in the disposal of the property of the company, or in making any claims against any supposed debtors to or persons liable to the company." (See a summary of the cases in which the Court has made winding-up orders against the wish of the majority of shareholders, and also in which winding-up orders have been refused at the wish of a majority of shareholders, given in Buckley, *Companies Acts*, 7th ed., pp. 288, 289.)

The Council of Medical Education is another instance of a domestic tribunal which the Legislature has set up for dealing with questions of professional misconduct (see *Leeson v. General Council of Medical Education*, 1889, 43 Ch. D. 366). The benchers of an Inn of Court and the committee of the STOCK EXCHANGE may be cited as further instances.

**Domestics.**—Domestic or menial servants are servants employed in a house, or in rendering personal services to, or in close personal relation with, the employer. The term includes not only ordinary household servants, but grooms, gardeners, and the like. (*Nowlan v. Ablett*, 1835, 2 C. M. & R. 56; *Nicoll v. Greaves*, 1864, 33 L. J. C. P. 259). A governess has been held not to be a domestic servant (*Todd v. Kerrich*, 1852, 8 Ex. Rep. 151), but no general rule can be laid down which will clearly demarcate those who do and those who do not come within the description.

In the absence of special stipulation the hiring is for a year, the wages being payable quarterly, and the service is determinable by one calendar month's notice. Whether a different rule as to notice prevails as to the first month has given rise to opposite decisions in the County Courts, and so far the point has not been decided in the High Court. If this notice is not given by the employer, a calendar month's wages must be paid in lieu thereof, with accruing wages up to the time of dismissal (*Gordon v. Potter*, 1859, 1 F. & F. 644), but not board wages. A servant is not entitled to leave on tendering a month's wages in lieu of notice.

In the case of wilful disobedience to a lawful order within the scope of the employment, misconduct, inability, or permanent disablement, the

servant may be dismissed without notice (*Turner v. Mason*, 1845, 14 Mee. & W. 112; *Cuckson v. Stones*, 1858, 1 El. & El. 248), and the wages accruing up to that time are forfeited.

Employers are not bound to give characters (*Carrol v. Bird*, 1800, 3 Esp. 201; 6 R. R. 824). As to fictitious characters, see 32 Geo. III. c. 56, as amended by the schedule to the Summary Jurisdiction Act, 1884.

Livery supplied to a servant belongs to the employer; at the end of the term of service, therefore, it is returnable to him, unless by agreement the servant may retain the same (*Crocker v. Molyneux*, 1828, 3 Car. & P. 470).

The employer is not bound to supply medical attendance or medicine.

Unless by special agreement, the employer cannot deduct from the servant's wages anything in respect of breakages, etc. (*Le Loir v. Bristow*, 1815, 4 Camp. 134), but in an action for wages a counterclaim may be made for the value of articles broken, etc.

Domestic servants are not "workmen" within the meaning of the Employers and Workmen Act, 1875, and are therefore not within the Employers Liability Act, 1880. See further, EMPLOYERS' LIABILITY; MASTER AND SERVANT.

[*Authorities*.—See Baylis, *Domestic Servants*; Macdonell, *Master and Servant*.]

**Domicile**, from the Latin *domicilium*, compounded of *domus* and the root *cil*. Smith's *Latin Dictionary* observes that "as *concilium* and *consilium* are frequently confounded, and as *consilium* probably contains the root *sed*, 'to sit,' we may conjecture that *domisilium* is the true orthography which would correspond to *exsilium*." The word is of modern introduction in our language. Even Cunningham's *New and Complete Law Dictionary*, 2nd ed., published as late as 1771, does not contain the word. In the time of Charles II. Sir Leoline Jenkins (*Life*, vol. ii. p. 785) speaks of it as a term "not vulgarly known." The maxim of law that the *lex domicilii* governs the succession to personalty seems, however, to have been acknowledged in his time, though it was not till 1790 in the Scotch House of Lords case, *Bruce v. Bruce* (M. 4617; 3 Pat. 163), that the wider effects of the principle seem to have been understood and to have become part of the working law of the land. With the development of international relations, our Courts in more recent years have had to deal more especially with difficulties of ascertaining what constitutes a domicile, a difficulty with which the laws of most European countries have also had to grapple, and which has been solved by them in different ways.

Under the Code Napoleon and the Codes which are based upon it, domicile is the place of "principal establishment" (French Civil Code, art. 102), and change of domicile takes place by the fact of actual residence coupled with the intention of making it the principal establishment (art. 103). The proof of intention results from a formal declaration to the municipal authorities, and in the absence of a formal declaration depends upon circumstances (art. 105). These provisions relate, however, to the private law of the countries which have adopted the Code Napoleon; the rule of international law they apply as the personal law of an alien is not the *lex domicilii* but that of the State to which he belongs by nationality.

The modern tendency, observes Professor Westlake, is to substitute political nationality for domicile as the test of personal law as far as possible. But, of course, as between two or more national jurisdictions comprised in one State, such as England, Scotland, and the province of Quebec, such a

substitution is not possible, and there at least the *lex domicilii* must maintain its ground (*Priv. Int. Law*, p. 6).

In the leading case of *Udny v. Udny* (1869, L. R., H. L. Sc. 441) Lord Westbury stated the law as it has been finally determined in the English Courts in the following terms:—"It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother, if illegitimate. This has been called the domicile of origin, and is involuntary. Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act. When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice; but as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicile, and it does not require to be regained or reconstituted *animo et facto* in the manner which is necessary for the acquisition of a domicile of choice. Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence, originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicile is established."

As Lord Westbury said, this is a description and not a definition.

No one, in fact, has yet been successful in giving a short and precise definition of domicile. Phillimore, basing his definition on the *dicta* of the American judges, who he considers have come nearest to a satisfactory solution, describes it as "a residence at a particular place accompanied by positive or presumptive proof of an intention to remain there for an unlimited time." Professor Dicey, the latest doctrinal authority, says that a person's domicile "is in general the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law" (*Conflict of Laws*, p. 79).

We have seen that it is a settled principle that no man can be without a domicile. This has led to the classification of domiciles to meet possible contingencies into (1) domicile of origin, (2) domicile of choice, and (3) domicile by operation of law. These three classes seem to cover the domicile of every man, woman, and child from birth to death. The domicile of origin is that with which he is invested at birth. He retains it until he chooses another, which becomes his domicile of choice. The domicile of dependent persons may be fixed apart from their actual place of habitation by operation of law.

The domicile of a child born in lawful wedlock is and changes with that

of his father (*Sharpe v. Crispin*, 1869, L. R. 1 P. & D. 611), and if his father dies before his majority, his domicile, if he lives with his mother, is and changes with hers (*Johnstone v. Beattie*, 1843, 10 Cl. & Fin. 42). [Unless she changes it in order to commit a fraud upon her child, in which case the domicile will remain the same as before the attempted fraud (*Douglas v. Douglas*, 1871, L. R. 12 Eq. 617, 625; *Pottinger v. Wightman*, 1817, 3 Mer. 67).] Professor Westlake sums up the authorities on this subject as follows:—"The law or jurisdiction of the father's last domicile provides for the guardianship, after his death, of his legitimate . . . unmarried minor children. A guardian, whether appointed by the father under that law, or by that law or jurisdiction itself, cannot change his ward's domicile except so far as he may be permitted to do so by the terms of his appointment, or by the law or the public authority under which he holds his office. Only if the mother is the guardian, and the appointment or law under which she holds expresses nothing contrary, the unmarried minor's domicile will follow the changes of hers, so long as she does not change her domicile with a fraudulent view to the minor's succession. Such fraud, however, will be presumed if no reasonable motive can be assigned for the change of her domicile. And where the mother's nominal guardianship is controlled by a Court which regards itself as being the real guardian, like the English High Court in the Chancery Division, she will not even have this limited power of changing her children's domicile. These principles regulate the domicile of a posthumous child as well as that of a child whose father died after its birth . . ." He admits, however, that he has stepped beyond his authorities in treating the case of the mother as a special one of guardianship, in taking the law of the father's last domicile as the governing principle for the whole, and in connecting posthumous children with the rest (*Priv. Int. Law*, 3rd ed., p. 301).

An illegitimate child is born with the domicile of its mother (*Urquhart v. Butterfield*, 1887, 37 Ch. D. 357 C. A.), and this domicile the child retains during minority.

Upon attainment of majority the faculty of acquiring the independent domicile, classed above as domicile of choice, obtains, but until the new domicile is acquired the domicile of origin subsists (*Collier v. Rivas*, 1841, 2 Curt. 855), and if this domicile of choice is later on abandoned and another is not acquired, the domicile of origin revives (*Munroe v. Douglas*, 1820, 5 Madd. 379; *Udny v. Udny*, cited above).

The acquisition of a new domicile depends on the combination of residence and intention of remaining at that residence permanently (*animo manendi*). "If it sufficiently appear," says an American decision, "that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by a residence of a few days" (*The Venus*, 8 Cranch, 279). But the actual duration of residence in the new country may be important as evidence of intention, though never important as a legal condition of the change of domicile (Westlake, *Priv. Int. Law*, 3rd ed., p. 311).

A new domicile, moreover, is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there (*Bell v. Kennedy*, 1868, L. R. 1 H. L. Sc. 307, 319). There is no authoritative definition of the *animus manendi*. Professor Dicey, however, picks out the four following essential points in its character:—(1) The intention must amount to a purpose or choice; (2) the intention must be an intention to reside permanently or for an indefinite period; (3) the intention must be

an intention of abandoning, i.e. of ceasing to reside permanently in the former domicile; (4) the intention need not be an intention to change allegiance (*q.v.*).

"In order that a man may change his domicile of origin" (per Jessel, M. R.) "he must choose a new domicile—the word choose indicates that the act is voluntary on his part; he must choose a new domicile by fixing his sole or principal residence in a new country (that is, a country which is not his country of origin) with the intention of residing there for a period not limited as to time" (*King v. Foxwell*, 1876, 3 Ch. D. 518, 520). But where intention of change of domicile is proved, the motive for it is of no importance. Derived by Professor Westlake from current of authorities (see *Priv. Int. Law*, 3rd ed., pp. 307–311).

"A person who removes to a foreign country," says an American decision already quoted, "settles himself there and engages in the trade of the country, furnishes by these acts such evidence of an intention permanently to reside there as to stamp him with the national character of the State where he resides" (*The Venus*, 8 Cranch, 279). A man having large debts in any country in which he had a domicile, but which he subsequently left, would not be presumed to continue such domicile, and a prolonged absence from a country from the same cause goes far to prove abandonment of such domicile (*De Greuchy v. Wills*, 1879, 4 C. P. D. 362, 363; *In re Robertson*, 1885, 2 T. L. R. 178).

In several cases contrary presumptions will prevail. Such a presumption is that against an Englishman acquiring a domicile in a country in which the political, social, and religious institutions are altogether different from those of Great Britain (*In re Tootal's Trusts*, 1883, 23 Ch. D. 532; *Abd-ul-Messih v. Farra*, 1888, 13 App. Cas. 431; *Abdallah v. Rickards*, 1888, 4 T. L. R. 622). Again, an exile from a foreign country does not, from the mere fact of settling within the United Kingdom, acquire a domicile here (*In re d'Orleans*, 1859, 28 L. J. P. 129), and a Peer of the British Parliament does not acquire a domicile abroad owing to his obligation to attend the House of Lords when summoned (*Hamilton v. Dallas*, 1875, 1 Ch. D. 257).

Persons in the Diplomatic and Consular Services do not acquire a domicile in the place where they discharge their functions by reason of their liability to be recalled at any time (*A.-G. v. Kent*, 1861, 31 L. J. Ex. 391, 397; *A.-G. v. Rowe*, 1862, 1 H. & C. 31; *Douglas v. Douglas*, 1871, L. R. 12 Eq. 617; *Niboyet v. Niboyet*, 1878, 4 P. D. 1).

An invalid going abroad for the benefit of his health does not thereby acquire a new domicile, the presumption being that he intends to return on regaining his health (*Firebrace v. Firebrace*, 1878, 4 P. D. 63–66).

In short, neither residence nor intention alone are enough to substantiate a change of domicile. Nor will a person's wish to retain a domicile suffice, if in fact these two circumstances are not combined, or his acts show an intention contrary to the wish he may have expressed (*In re Steer*, 1858, 3 H. & N. 599).

An opinion of Lord Kingsdown in the case of *Moorhouse v. Lord*, 1863 (10 H. L. 272), has given rise to much discussion. In speaking of the acquisition of a French domicile, he said, "A man must intend to become a Frenchman instead of an Englishman." It was supposed that this was designed to substitute nationality for domicile as the criterion of the personal law. "These words," said Lord Westbury in *Udny v. Udny*, "are likely to mislead, if they were intended to signify that for a change of domicile there must be a change of nationality, that is of natural allegiance. That would be to confound the

political and civil status of an individual, and to destroy the difference between *patria* and *domicilium*." Whatever Lord Kingsdown's precise meaning may have been, Lord Westbury's distinction expresses the existing state of the law.

The domicile of a married woman is the same, and changes with every change of the domicile of her husband (*Harvey v. Farnie*, 1882, 8 App. Cas. 43, 50, 51), even though she reside apart from him (*Dolphin v. Robins*, 1859, 7 H. L. 390; 29 L. J. P. 11; *Yelverton v. Yelverton*, 1859, 29 L. J. P. 34). In the above-quoted case of *Harvey v. Farnie*, Lord Selborne set out the law on this point as follows:—"When a marriage—there being no personal incapacity attaching upon either party, or upon the particular party who is to be regarded—has been duly solemnised according to the law of the place of solemnisation, the parties become husband and wife. But when they become husband and wife, what is the character which the wife assumes? She becomes the wife of the foreign husband in the case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicile than his which she acquires. The marriage is contracted with a view to that matrimonial domicile which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner domiciled and contemplating settled and permanent residence abroad. Therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law, subject to it in respect to the matrimonial relation and all other consequences depending upon the law of the husband's domicile."

On the death of her husband, the widow retains his last domicile until she changes it, which she can do in the same way as any other person *sui juris* (*Gout v. Zimmerman*, 1847, 5 N. C. 440, 447).

A divorced woman is in the same position as a widow. She retains the domicile she had immediately before the divorce till she acquires another (*Williams v. Dormer*, 1851-52, 2 Rob. Eccl. 505; *Scott v. A.-G.*, 1886, 11 P. D. 128).

In case of judicial separation, the wife can, for some purposes, at all events, acquire a domicile of her own (*Le Sueur v. Le Sueur*, 1876, 1 P. D. 139, 141; *Dolphin v. Robins*, 1859, 29 L. J. P. 11, 14, 15).

The domicile of a lunatic who has become such after attaining his majority is not changed by a change in that of the person who has his legal custody. It remains that which it was at the commencement of his lunacy. In *Bempde v. Johnstone*, 1796, 3 Ves. 198, Lord Loughborough doubted whether residence in a country as a lunatic might not be added to previous residence in the same country for the purpose of fixing his domicile there (see Westlake, p. 301).

The above rules of domicile can hardly be applied to corporations except by somewhat forcing the sense of the *animus manendi* and residence. "The domicile of a corporation," says Professor Dicey, "is a fiction suggested by the fact that a corporation is, on certain points, e.g. the jurisdiction of the Courts, subject to the law of a particular country. A man, that is to say, in some respects, is subject to the law of England because he has in fact an English domicile; a corporation is by a fiction supposed to have an English residence or domicile because it is in certain respects subject to the law of England. Hence a corporation may very well be considered domiciled, or resident in a country for one purpose and not for another, and hence, too, the great uncertainty as to the facts which determine the domicile or residence of a corporation. In each case the particular question is not at bottom



whether a corporation has in reality a permanent residence in a particular country, but whether for certain purposes (*e.g.* submission to the jurisdiction of the Courts, or liability to taxation) a corporation is to be considered as resident in England or in some other country." (See as to the residence of a corporation under the Income Tax Act, 1853, s. 2, Sched. D.; *Cesena Sulphur Co. v. Nicholson*, 1876, 1 Ex. D. 428; *Imperial Continental Gas Association*, 1877, 37 L. T. 717; *London Bank of Mexico, etc. v. Aphorpe*, [1891] 2 Q. B. (C. A.) 378.)

In *Jones v. The Scottish Accident Insurance Co. Ltd.* (1886, 17 Q. B. D. 421), the latter, whose registered office was in Scotland, and whose secretary resided there, but which also had agencies and a chief office within the jurisdiction of the High Court, issued a policy through an agent within the jurisdiction to whom the premiums were paid. The company having refused to pay a claim on the policy, it was held that it was not domiciled or ordinarily resident within the jurisdiction, and that leave to issue a writ for service out of the jurisdiction could not be granted. The case turned upon Order 11, r. 1, under which service out of the jurisdiction of a writ of summons may be allowed whenever any relief is sought against any person domiciled or ordinarily resident within the jurisdiction, or when the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction unless the defendant is domiciled or ordinarily resident in Scotland or Ireland. Mr. Justice Cave was of opinion that the language of Order 11 does not expressly apply to companies, but the analogy of the practice with regard to individuals was against the present application. In the case of a man residing and carrying on business in Scotland, but having branch establishments in England, it was clear that leave would not be given to issue a writ for service out of the jurisdiction; it would be absurd to say he was ordinarily resident in England because he had a branch establishment there, and a plaintiff in such a case would be unable to bring himself within subsec. (c) of Order 11, r. 1. If that is the way in which the Courts have dealt with the case of an individual, why should they not deal in the same way with that of a company? An individual carrying on business in Scotland with branches in England is resident at the place where he carries on his business; why should we adopt a different rule for a company? Legislation had gone on that footing, and the old Companies Act (8 & 9 Vict. c. 16, s. 135) provides that service shall be effected at the principal office of the company, or at one of the principal offices if there be more than one, or personally upon the secretary. The principal office is there regarded as the place where the company carries on its business, and putting together the enactment and the decisions, it followed that, in the case of a company, service must be effected either at its principal place of business or upon its secretary, and that neither the company nor its secretary could be said to be resident in England, when the company's principal place of business is in Edinburgh and the secretary resides there. The application was therefore refused. See further, SERVICE OUT OF THE JURISDICTION.

There is one statute referring to domicile, namely, 24 & 25 Vict. c. 121, entitled "An Act to amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident abroad, and of Foreign Subjects whilst resident within Her Majesty's Dominions." By sec. 1 it was enacted that England might enter into special conventions with foreign States, and that all British subjects dying thereafter in those States shall not be deemed under any circumstances to have acquired a domicile in such country unless

any such British subjects shall have been resident in such country for one year immediately preceding the decease, and have expressed a wish in due form and in writing to become domiciled in such foreign country. The same provision was made in the case of foreigners dying in England. No convention has as yet been concluded under this Act, which has thus far remained a dead letter.

[*Authorities.*—Dicey, *Conflict of Laws*, London, 1896; Dicey, *The Law of Domicile*, London, 1879; Westlake, *Private Inter. Law*, 3rd ed., London, 1890; Nelson, *Selected Cases Private Inter. Law*, London, 1889; Phillimore, *Inter. Law*, vol. iv., London; Round, *English Law of Domicile*, London, 1861; Phillimore, *Law of Domicile*, London, 1847; Wharton, *Digest of the Inter. Law of the United States*, Washington, 1886, vol. ii. s. 198.]

**Donatio inter vivos.**—For a gift *inter vivos* two things are necessary—the intention to give, followed by acts giving effect to the intention. So long as the *intention* is not completely carried out, the gift is imperfect and the donee has no legal rights against the donor. A mere promise to give is of no legal effect.

• It follows that the donee cannot maintain an action upon the promissory note of the donor (*Halliday v. Atkinson*, 1826, 5 Barn. & Cress. 501).

As to *donatio mortis causa* of cheques, see vol. ii. p. 505.

A cheque is an authority from the drawer to the bank to pay the amount of the cheque. If therefore the donee of a cheque upon the donor's bankers does not cash it in the donor's lifetime the gift fails.

Possibly if the donee presents the cheque and the bankers decline to pay it because they doubt the signature, the gift may be good though the donor dies before payment (*Tate v. Hibbert*, 1793, 2 Ves. Jun. 111; 2 R. R. 175; *Bromley v. Brunton*, 1868, L. R. 6 Eq. 275).

Upon similar principles a mere declaration of intention to forgive a debt has no effect; there must be something amounting to a release in law (*Cross v. Sprigg*, 1849, 6 Hare, 553).

Acceptance by the donee is not essential to complete the gift. Acceptance will be presumed though he is not aware of the gift. He may, of course, repudiate the gift when he becomes aware of it (*Handing v. Bourring*, 1885, 31 Ch. D. 282; *London and County Banking Co. v. London and River Plate Bank*, 1888, 21 Q. B. D. 535 at p. 541).

As regards the intention to give, it lies upon a donee, if called upon to do so, to support a gift, and therefore to show the intention to give.

If, however, the donor stands to the donee in a relation from which an obligation, either natural or assumed on the part of the donor, to provide for the donee can be inferred, the intention to give will be presumed.

Such an obligation exists, and accordingly the intention to give will be presumed, where the donor is the father of, or *in loco parentis* to, or the husband of, the donee. It does not exist in the case of a widowed mother (*Soar v. Foster*, 1858, 4 Kay & J. 160; *Hepworth v. Hepworth*, 1870, L. R. 11 Eq. 10; *Bennet v. Bennet*, 1879, 10 Ch. D. 474; see vol. i. p. 157, sub tit. ADVANCEMENT).

On the other hand, where a fiduciary relation<sup>a</sup> subsists between the donee and donor, such as the relation of guardian and ward, solicitor and client, physician and patient, priest and nun, and the like, a gift made while the relation continues can only be upheld if it is shown that the gift was the spontaneous act of the donor under circumstances which entitled

him to exercise a free and independent will,—a burden of proof which it is difficult if not impossible to discharge (*Allcard v. Skinner*, 1887, 36 Ch. D. 145; *Morley v. Loughnan*, [1893] 1 Ch. 736; *Liles v. Terry*, [1895] 2 Q. B. 679).

A gift made under such circumstances will become valid if after the relation has ceased the donor intentionally abides by the gift (*Mitchell v. Homfray*, 1881, 8 Q. B. D. 587).

As regards the *acts* necessary to carry out the intention to give: A gift may be made either (a) by a transfer of property to the donee or to trustees for the donee, or (b) through the medium of a trust by which the donor constitutes himself a trustee for the donee. It is a question of intention in each case whether the donor intended to make the gift by means of a transfer or to convert himself into a trustee. If the intention was to transfer, the gift, if imperfect, cannot be supported through the medium of a trust, nor *vice versa* (*Milrby v. Lord*, 1862, 4 De G., F. & J. 264; *Richards v. Delbridge*, 1874, L. R. 18 Eq. 11; *Heartley v. Nicholson*, 1874, L. R. 19 Eq. 233; *Carter v. Carter*, [1896] 1 Ch. 62).

Where the gift is intended to take effect by way of transfer, the donor must have done all in his power to divest himself of the property which he has in the subject-matter of the gift, and to vest it in the donee.

Thus the gift of chattels passing by delivery, if not made by deed, must be completed by delivery (*Cochrane v. Moore*, 1890, 25 Q. B. D. 57; *Kilpin v. Ratley*, [1892] 1 Q. B. 582).

If the property can only pass by deed, there must be a deed to complete the gift; for instance, the delivery of a policy of assurance by way of gift to a donee passes no interest in the policy moneys, but only the right to the paper upon which the policy is written (*Barton v. Gainer*, 1858, 3 H. & N. 387; *Rummens v. Hare*, 1876, 1 Ex. D. 169).

And delivery of a title-deed deposited with the donor by way of equitable charge passes no right either to the charge or to the deed (*In re Richardson*, *Shillito v. Hobson*, 1885, 30 Ch. D. 396).

Apparently a voluntary assignment of a debt secured by mortgage without a transfer of the securities is incomplete, though the effect may be to give a right of action against the donor, if he afterwards gets in the debts (*Woodford v. Charney*, 1860, 28 Beav. 96; *Bizzey v. Flight*, 1876, 24 W. R. 957; *In re Patrick*, *Bills v. Tatham*, [1891] 1 Ch. 82).

A voluntary assignment by deed of a reversionary equitable interest is effectual (*Kekewich v. Manning*, 1851, 1 De G., M. & G. 176; *Donaldson v. Donaldson*, 1854, Kay, 711; *In re Way's Trusts*, 1864, 2 De G., J. & S. 365).

But a mere voluntary charge on a reversionary interest rests in contract only, and cannot be enforced (*In re Earl of Lucan*, *Hardinge v. Cobden*, 1890, 45 Ch. D. 470).

There is some doubt whether, where property is vested in trustees for a donor, an assignment by the donor of his equitable interest is effective, if the legal title is not also vested in the donee (*Bridge v. Bridge*, 1852, 16 Beav. 315; *Beech v. Keep*, 1854, 18 Beav. 285).

A voluntary assignment of a debt is complete without notice to the debtor (*Fortescue v. Barrett*, 1834, 3 Myl. & K. 36; *Donaldson v. Donaldson*, 1854, Kay, 711).

If the gift is intended to take effect through the medium of a trust, and the subject-matter is lands, tenements, or hereditaments, the trust must, having regard to the Statute of Frauds, be manifested and proved by some writing signed by the beneficial owner (see 29 Car. II. c. 3, s. 7; *Kronheim v. Johnson*, 1877, 7 Ch. D. 60).

A trust of personalty may be created by parol (*M'Fadden v. Jenkyns*, 1842, 1 Ph. Ch. 153; *Peckham v. Taylor*, 1862, 31 Beav. 250).

As a general rule, a gift, if complete, is not revocable at the pleasure of the donor, but there is an exception to the rule in the case of voluntary assignments for the purpose of paying the assignor's debts. In those cases the Court will examine the circumstances for the purpose of ascertaining whether the motive of the assignor was to benefit his creditors or to promote his own convenience. In the latter case, so long as the deed has not been communicated to the creditors, it is revocable (*Garrard v. Lord Lauderdale*, 1830, 3 Sim. 1; *Smith v. Hurst*, 1851, 10 Hare, 30; *New France & Garrard's Trustee v. Hunting*, [1892] 2 Q. B. 19).

Formerly a voluntary conveyance of land was liable to be defeated by a subsequent sale by the donor for valuable consideration, but this liability has been removed by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21). As to the avoidance of voluntary settlements on bankruptcy, see vol. i. p. 507.

**Donatio mortis causâ** is a gift made in contemplation of death, and upon condition that it is to take effect only in case of the death of the donor. The condition need not be expressed. The Court infers it if the gift is made in contemplation of death, and there is nothing to show a contrary intention. If the donor recovers, the gift is revoked (*Tate v. Hibbert*, 1793, 2 Ves. Jun. 111; 2 R. R. 175; *Gardner v. Parker*, 1818, 3 Madd. 184; 18 R. R. 213; *Edwards v. Jones*, 1836, 1 Myl. & Cr. 226).

Therefore an absolute and irrevocable gift cannot be a *donatio mortis causâ* (*Edwards v. Jones*, 1836, 1 Myl. & Cr. 226).

To constitute a good *donatio mortis causâ* there must be delivery of the subject-matter of the gift to the donee or to some person on his behalf, though an antecedent delivery, *alio intuitu*, is sufficient (*Powell v. Hellicar*, 1858, 26 Beav. 261; *Cain v. Moore*, [1896] 1 Q. B. 283).

As to what property may be the subject-matter of a *donatio mortis causâ*, it is not easy to deduce any principle from the cases. It is plain that the subject-matter may be of such a kind that the property does not pass to the donee by delivery, but no general principle can be laid down as to what may or may not be given. It was said in *In re William Hughes* (1888, 36 W. R. 821) that the subject of *donationes mortis causâ* must be things the title to which, or the evidences of title to which, passes by delivery.

The following have been held capable of being the subject-matter of a *donatio mortis causâ*:—(a) Coin and banknotes (*Lawson v. Lawson*, 1718, 1 P. Wms. 441; *Miller v. Miller*, 1735, 3 P. Wms. 356; *Shanley v. Harvey*, 1762, 2 Eden. 126); (b) bonds and mortgage deeds (*Gardner v. Parker*, 1818, 3 Madd. 184; *Duffield v. Elwes*, 1827, 1 Bli. N. S. 497; *Merideth v. Watson*, 1853, 17 Jur. 1063; *In re Patterson*, 1864, 10 Jur. N. S. 578); (c) bills of exchange, promissory notes, and cheques payable to the donor's order and not indorsed (*Rankin v. Wegulein*, 1829, 27 Beav. 309; *Veal v. Veal*, 1859, 27 Beav. 303; *In re Mead*, *Austin v. Mead*, 1880, 15 Ch. D. 651; *Clement v. Cheesman*, 1884, 27 Ch. D. 631); (d) deposit receipts, though stated to be not transferable (*Amis v. Witt*, 1863, 33 Beav. 610; *Moore v. Moore*, 1874, L. R. 18 Eq. 474; *Cassidy v. Belfast Banking Co.*, 1887, 22 L. R. Ir. 68; *In re Dillon*, *Duffin v. Duffin*, 1890, 44 Ch. D. 76); and (e) a policy on the donor's life (*Amis v. Witt*, 1861, 1 B. & S. 109).

On the other hand, an instrument which forms no part of the title to

property cannot take effect as a *donatio mortis causa* of the property. Thus, a receipt for South Sea annuities, which was apparently a document forming no part of the title to the annuities, did not operate as a *donatio mortis causa* of the annuities. And this principle has been extended to scrip certificates for railway stock (*Ward v. Turner*, 1751, 2 Ves. 431; *Moore v. Moore*, 1874, L. R. 18 Eq. 474; see also *In re Mead*, *Austin v. Mead*, 1880, 15 Ch. D. 651).

A *donatio mortis causa* is subject to debts, and is liable to legacy duty, but it does not require probate or the executor's assent (*Smith v. Casen*, 1718, 1 P. Wms. 406; *Thompson v. Hodgson*, 1795, 2 Stra. 777).

[*Authority*:—Jarman on *Wills*, 5th ed.]

### **Donative Advowson.**—See ADVOWSON.

**Done.**—An omission to do something which ought to be done in order to the complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to “an act done or intended to be done” within the meaning of a clause requiring a notice of action (*R. v. Williams*, 1884, 53 L. J. C. P. 64 at p. 71, citing *Jolliffe v. Wallasey Local Board*, 1874, L. R. 9 C. P. 378). See also *R. v. St. John's, Hackney*, 1835, 2 Ad. & E. 548; *Ongley v. Chatham*, 1887, 4 T. L. R. 6; *Edwards v. Vestry of St. Mary, Islington*, 1889, 58 L. J. Q. B. 165).

**Dormant Funds.**—The term “dormant funds” is applied to such funds in the books of the Pay Office as have not been dealt with for upwards of fifteen years. With respect to these the Supreme Court Funds Rules, 1894, provide that on or before the 1st day of March in every third year the Paymaster shall prepare a list of the accounts in the books of the Pay Office (other than those where the balances do not amount to £5) to the credit of which there stood on the 1st day of the preceding September any funds not less than £50 which have not been dealt with, otherwise than by the continuous investment or placing on deposit of dividends, during the fifteen years immediately preceding the last-mentioned date. The list must be filed in the Central Office, and a copy inserted in the *London Gazette*, and exhibited in the several offices of the Court. The Paymaster may in his discretion give any information respecting any funds in Court mentioned in the list, upon a request signed by the person applying for information or his solicitor. The request, if made by a solicitor, must state the name of the person on whose behalf the application is made, and that such person is in the opinion of the applicant beneficially interested in the funds. If the request be made by any person other than a solicitor, information will not be given unless the applicant is able to satisfy the Paymaster that the request is such as may in the particular case be properly complied with (r. 101).

Wherever a cause or matter has been inserted in the above-mentioned list, the fact must be notified on the certificate of fund which is issued by the Paymaster pursuant to r. 99.

Every petition or summons for dealing with funds which have been placed in the list of dormant funds must contain a statement that such funds have not been dealt with for fifteen years or upwards, and, where

such funds amount to or exceed in value £500, a copy of such petition or summons must, unless the Court or a judge shall otherwise direct, be served on the official solicitor of the Court (R. S. C., 1883, Order 22, r. 12 b).

The last list of dormant funds was published in a supplement to the *London Gazette* on 4th March 1896. Such list does not state the amount standing to the credit of each particular account. It is understood that the aggregate amount of the balances is about £1,000,000 sterling. As a rule, the amount of the fund to any one credit is not large, one-half of the balances not exceeding £150, and only one-sixteenth exceeding £1000.

In connection with the subject of dormant funds, it may be stated that it is not the practice to order a fund which has been many years in Court without having been dealt with to be paid out to the legal personal representative of the person to whose account it stands, merely upon its being shown that there are persons beneficially interested; that part of the fund only will be parted with as to which it is directly proved who are the persons beneficially interested; the costs, however, of the legal personal representative and of the other parties will be directed to be paid out of the whole fund (*Samson v. Samson*, 1870, 18 W. R. 530; and see *Orrok v. Binney*, 1822, Jac. 523; *Loy v. Duckett*, 1841, Cr. & Ph. 305; *Edwards v. Harvey*, 1863, 11 W. R. 330; *Peacock v. Saggors*, 1862, 4 De G., F. & J. 406). The ordinary rule of practice adopted is that the beneficial interest will be followed where the person entitled has been dead more than twenty years (cp. *Ex parte Roskrow*, W. N. 1885, 3).

[*Authorities*.—Supreme Court Funds Rules, 1894, rr. 99, 101; R. S. C., 1883, Order 22, r. 12 b; Dan. Ch. Pr., 6th ed., pp. 1729, 1730, 1778, 1780; *The Annual Practice*, 1897, vol. i. pp. 546, 547; vol. ii. pp. 282, 283, 307, 308.]

### Double Complaint.—See DUPLICITY.

**Double Rent and Double Value.**—These are statutory remedies which, under certain prescribed conditions, are given to landlords when their tenants refuse to give up possession of the premises demised to them upon the determination of their interests. The former applies when the tenant holds over after he has himself given notice to quit; the latter when he holds over after he has received notice from the landlord. The conditions referred to are, as will be seen, essentially different.

(1) *Double Rent*.—The Distress for Rent Act, 1737 (11 Geo. II. c. 19), provides (sec. 18) that a tenant who has given a notice to quit, and who fails to give up possession of premises demised to him at the time specified in such notice, shall thenceforward pay double the rent or sum which he would otherwise have paid, "to be levied, sued for, and recovered at the same time and in the same manner as the single rent or sum," and "to be paid during all the time" he "shall continue in possession." For the statute to operate, the tenant must have given a notice which, by complying with the prescribed requirements as to form and length (see NOTICE TO QUIT), was binding when it was given both upon himself and upon the landlord (*Johnstone v. Hudlestone*, 1825, 4 Barn. & Cress. 922; 28 R. R. 505). Where, for example, a tenant gave notice to quit "as soon as" he "could possibly get another situation," it was held that double rent could not be recovered against him when he held over after the condition was fulfilled

(*Farrance v. Elkington*, 1811, 2 Camp. 591; 11 R. R. 807). It is not necessary that the notice should have been in writing (*Timmins v. Rowlinson*, 1765, 3 Burr. 1603). The double rent given by the statute may, as has just been seen, be "levied" in the same way as the ordinary rent, and may consequently be recovered by distress (see *Humberstone v. Dubois*, 1842, 10 Mee. & W. 765). Though the statute has been held not to extend to a weekly tenant (*Sullivan v. Bishop*, 1826, 2 Car. & P. 359), it applies, as already stated, to "any tenant or tenants," and the decision, if correctly reported, would seem to have been given *per incuriam*. It applies to a tenancy though created only by parol (*Timmins v. Rowlinson*, *supra*). A tenant who, after having given notice, holds over for a year paying double rent under the statute, may quit at the end of such year without fresh notice, for the statute in terms provides that double rent shall only be paid while the tenant continues in possession (*Booth v. Macfarlane*, 1831, 1 Barn. & Adol. 904).

(2) *Double Value*.—By 4 Geo. II. c. 28. s. 1, if any tenant "for any term of life, lives, or years," or any person in possession of any hereditaments by, from, or under such tenant shall "wilfully hold over" after the determination of such term, and "after demand made and notice in writing" for possession by his landlord or other owner of the reversion or his lawfully authorised agent, such person so holding over shall "for and during the time he . . . shall so hold over or keep the person . . . entitled out of possession," pay to the latter, his executors, administrators, or assigns, "at the rate of double the yearly value of the . . . hereditaments so detained, to be recovered . . . by action of debt, . . . against the recovery of which said penalty there shall be no relief in equity."

There are several important points of difference in the application and effect of the two statutes here considered. For a study of the language of the Act just set out, shows (a) that double value can be recovered by action only; (b) that it can only be recovered in the case of tenancies of specified kinds; (c) that the notice upon which the action is founded must be in writing; (d) that the holding over must be "wilful"; (e) that the damages recoverable are to a certain extent discretionary. To which may be added (f) that the existence of the relation of landlord and tenant between the parties to the action is not necessary. A few observations are appended upon each of these points in their order.

(a) The statute itself providing an "action of debt" as the means of recovering double value, it has been judicially pointed out that no distress for it, as in the case of double rent, can be levied (*Timmins v. Rowlinson*, 1765, 3 Burr. 1603). The statute, as will have been seen, in terms describes double value as a penalty. Hence the action (under 3 & 4 Will. IV. c. 42, s. 3) must be brought within two years, and discovery therein, whether of documents or by interrogatories, will not, in compliance with established rule, be permitted to the plaintiff.

(b) Unlike the double rent statute, which, as has been seen, applies to "any tenant or tenants," the double value statute applies only to a "term of life, lives, or years." This seems to cover a tenancy from year to year (*Lake v. Smith*, 1805, 1 N. R. 174; *Ryal v. Rich*, 1808, 10 East, 48), but not one from week to week (*Lloyd v. Rosbee*, 1810, 2 Camp. 453), or (probably) from quarter to quarter\* (see *Wilkinson v. Hall*, 1837, 3 Bing. N. C. 508).

(c) Like the double rent statute, the double value statute requires that in those cases where notice to quit is necessary, the first step for recovery of the penalty should be a notice, which by law is valid and binding upon both parties (*Page v. More*, 1850, 15 Q. B. 684). But whereas a parol

notice is sufficient in the former case, the Statute 4 Geo. II. requires a "demand made and notice in writing given," though it has been held that no demand other than that contained in the notice is necessary (*Wilkinson v. Colley*, 1771, 5 Burr. 2694). In yearly tenancies, the ordinary form of notice to quit on a given day, "or on such other day as your tenancy shall expire next after the expiration of half a year from the receipt of this notice," is sufficient (*Hirst v. Horn*, 1840, 6 Mee. & W. 393). In tenancies for a fixed term, where no notice to quit is required at all, a written notice, described as a notice to quit, will satisfy the requirements of the statute (*Messenger v. Armstrong*, 1785, 1 T. R. 53; 1 R. R. 148). Nor need it necessarily be given before the end of the term, so long as the landlord has not been party to any act after its determination involving a recognition of the tenancy (*Cobb v. Stokes*, 1807, 8 East, 358; 9 R. R. 464).

(d) While the double rent statute is silent as to the kind of holding over on the part of the tenant necessary to bring it into play, the double value statute in terms restricts it to one which is "wilful"; and this has been interpreted to mean a holding over with knowledge of its wrongfulness (*Swinfen v. Bacon*, 1861, 6 H. & N. 846), as distinguished from one in the exercise of a fair (*Hirst v. Horn*, *supra*) claim of right (*Wright v. Smith*, 1805, 5 Esp. 203). Where, for instance, the holding over is by an under tenant, the tenant cannot be made liable under the statute without proof of its having been authorised by him (*Rands v. Clark*, 1870, 19 W. R. 48).

(e) Both double rent and double value are payable only during the actual time of the holding over. But while the penalty in the former case is by its very nature a specific sum, that in the latter is merely payment "at the rate of double the yearly value" of the premises held over. This is not necessarily double the rent the tenant has been paying, though it is perhaps generally estimated on that footing; but it is the sum which an occupier would give, and which the landlord, but for the holding over, would have received for the use of the freehold and everything connected with it, during the time the possession has been withheld (*Robinson v. Learoyd*, 1840, 7 Mee. & W. 48). And as the double value given by the statute is that of the "lands, tenements, and hereditaments" held over, the value of anything not in the nature of real property which may be demised with the premises (*e.g.* steam power in a mill), is not to be taken into account (*s. c.*)

(f) Unlike the double rent statute, which contemplates the continuance of the relation of landlord and tenant between the parties, the double value statute allows of the action being brought against a person whom the landlord has decided to treat as a trespasser, and against whom he has brought ejectment (*Schulby v. Neving*, 1808, 9 East, 310; 9 R. R. 567). The present practice indeed provides that a claim for double value may be joined with a claim for the recovery of land without the leave of the Court, which is in general required in such cases to be obtained (R. S. C., 1883, Order 18, r. 2).

The action of double value may be brought by a mortgagee (*Poole v. Warren*, 1838, 8 Ad. & E. 582), as owner of the reversion within the statute. But it cannot be brought by a person to whom a new lease has been granted, to commence at the expiration of the tenancy held over (*Blatchford v. Cole*, 1858, 5 C. B. N. S. 514). One tenant in common may bring the action in respect of his share (*Cutting v. Derby*, 1776, 2 Black. W. 1075). The action can, if the sum claimed do not exceed £50, be brought in the County Court (*Wickham v. Lee*, 1848, 12 Q. B. 521).



Where the landlord accepts the ordinary rent after this right to double value has accrued, it is a question of fact whether he intended to waive such right or only to receive the money in part satisfaction of the larger claim (*Ryal v. Rich*, 1808, 10 East, 48).

**Dower.**—See HUSBAND AND WIFE. Dower, curtesy, and the like estates are treated as “property settled by will” for purposes of estate duty (Finance Act, 1894, s. 22 (3)).

**Drain, Drainage.**—The word drain is used in English law in different senses, according to the subject-matter to which it is applied. The primary meaning of the word is a passage-pipe or open channel for the removal of water or other liquid, especially from land or houses (see *Century Dictionary*, p. 1758).

*House Drains.*—By the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 4, which repeats the words of the earlier Act of 1848, now repealed, “drain” is defined as meaning “any drain of, and used for the drainage of, one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool, or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed.” All other drains, except drains vested in or under the control of a road authority, which is not also a local sanitary authority, are included under the term “sewer.” Drains usually belong to the owner of the premises from which they run, while sewers vest in, and are under the control of, the sanitary authority.

By sec. 21 the owner or occupier of any premises within the district of a local authority is entitled to cause his drains to empty into their sewers, on giving proper notice of his intention to do so, and complying with their regulations as to the mode in which the communication is to be made. This, however, gives no right to connect or use a drain in defiance of the regulations (*Charles v. Finchley Board*, 1883, 23 Ch. D. 767). If the sewer is in an adjoining district, and therefore vested in another local authority than that under whose jurisdiction the premises are situate, the drain may still communicate with it, but only on such terms and conditions as may be agreed on, or may be settled by arbitration or by justices in case of difference (s. 22). In such cases the local authority can, and usually does, insist on payment for the privilege.

In urban districts no house newly erected or rebuilt since the year 1848 may be occupied unless it has a proper covered drain communicating with a public sewer, if there is one within 100 feet, or else with a covered cesspool, which must not be under the house. The drain must be of such size and materials, and at such level, and with such fall as the urban authority consider necessary (Public Health Act, 1875, s. 25). Besides this, if a sanitary authority consider any house within their district to be without a drain sufficient for effectual drainage, they may require the owner or occupier to provide one to their satisfaction; and, if their notice is not complied with, may provide it themselves at his expense (*ibid.* s. 23). The local authority are the judges of what constitutes a sufficient drain; and their decision can seldom be reviewed by any legal tribunal (*Austin v. Lambeth Vestry*, 1858, 27 L. J. Ch. 677).

Similar provisions as to sanitary conveniences for new houses erected

since 1848, and as to requiring them in other cases where it is considered necessary, are contained in secs. 35-38.

The cleansing and repairing of house drains is *prima facie* the duty of the occupier of the premises to which they belong (*Russell v. Shenton*, 1842, 3 Q. B. 449). Every local authority must provide that all drains, closets, etc., within their district are constructed and kept so as not to be a nuisance or injurious to health (Public Health Act, 1875, s. 40). On written complaint that any drain, etc., is a nuisance or injurious to health, they may empower their officers to enter and examine the premises complained of. If the drain, etc., on examination, appears to be in bad condition, or to require alteration or amendment, the local authority shall forthwith give the owner or occupier of the premises notice to do the necessary work; and, in default, may themselves do the work at the expense of the owner (*ibid.* s. 41). The local authority seem to be the sole judges of what works are necessary (*Hargreaves v. Taylor*, 1863, 3 B. & S. 54). Among the things enumerated in sec. 91 as nuisances, which may be dealt with summarily, are: any "cesspool, drain, or ashpit, so foul or in such a state as to be a nuisance or injurious to health." The local authority, on being satisfied of the existence of the nuisance, are to serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the nuisance, and to execute such works and do such things as may be necessary for that purpose (s. 94). If the notice is not complied with, the case is brought before a Court of summary jurisdiction, who, if satisfied that the nuisance exists, or is likely to recur, shall make an order requiring the abatement of the nuisance, and the execution of any works necessary for that purpose (s. 96). These powers have frequently been invoked for the purpose of remedying nuisances arising from defective drains; and, when properly enforced, are effective.

*Sewers.*—By sec. 13 of the Public Health Act, 1875, all existing and future sewers (as defined by sec. 4, *supra*) within the district of a local authority—together with all buildings, works, materials, and things belonging thereto—vest in, and are under the control of, that authority. The local authority thus become owners of so much of the soil as is occupied by the sewer, so long as it is so occupied (*Taylor v. Oldham Corporation*, 1876, 4 Ch. D. 395); if, however, the sewer should cease to exist, the property in the ground which it had occupied would revert to the landowner (*Rolls v. St. George's, Southwark*, 1880, 14 Ch. D. 785). Pipes laid for sewers, but which, for want of outfall, cannot carry off sewerage, are not sewers, and so do not vest in the local authority (*Meader v. West Cotes Board*, 1892, 67 L. T. 454); and the Act excepts from the sewers which so vest (1) sewers made by any person for his own profit, or by a company for the profit of the shareholders; (2) sewers made for the purpose of draining, preserving, or improving land, under a local or private Act of Parliament, or for irrigating land; (3) sewers under the authority of any commissioners of sewers. By sec. 14 a local authority may purchase or acquire any sewer or any right of making, or of user, or other right in or respecting a sewer; and by sec. 18 they may from time to time enlarge, lessen, alter the course of, cover in, or otherwise improve any sewer belonging to them; they may also discontinue, close up, or destroy, any sewer that in their opinion has become unnecessary, on condition of providing another for the use of any person served by the one so discontinued. By sec. 16 a local authority may carry their sewers through, across, or under any street, public or private, within their district, and also,

after giving reasonable notice, through private lands, wherever it appears to their surveyor necessary to do so. They are not obliged to purchase any land for the purpose (*Hill v. Wallesey Board*, [1894] 1 Ch. 133), but must, of course, compensate the landowner for any injury caused by the construction of the sewer.

Sec. 15 enacts that every local authority shall keep in repair all sewers belonging to them; and shall cause to be made such sewers as may be necessary for effectually draining their district; and sec. 19, that they shall cause all sewers belonging to them to be constructed, covered, ventilated, and kept, so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied. The meaning of these sections has been frequently discussed in cases where plaintiffs have sought to make local authorities responsible for failure to discharge the duties so imposed. Sec. 299 provides that the Local Government Board may interfere, where complaint is made that a local authority have made default in providing their district with sufficient sewers, or in the maintenance of existing sewers, and may order the necessary works to be carried out within a limited time. Obedience to the order may be enforced by a writ of mandamus, or the Local Government Board may appoint some person to perform the duty at the expense, and with the powers of, the defaulting local authority. The discretion of the Local Government Board in making or refusing these orders is unfettered. If they refuse to make an order, the Courts will not grant a mandamus to compel them to do so (*R. v. Tottenham Board*, 1893, 9 T. L. R. 414); and where an order has been made the Courts consider themselves practically bound to grant a mandamus to enforce obedience to it (*R. v. Staines Board*, 1893, 69 L. T. 714). In case default is made by a rural district council, there is an alternative appeal to the County Council instead of to the Local Government Board, under secs. 16 and 19 of the Local Government Act, 1894 (56 & 57 Vict. c. 73). The County Council in such cases may assume the powers and duties of the defaulting district council for the purpose of the matter complained of, or may make an order similar to that which the Local Government Board can make, and enforce compliance with it as they can. The County Council can only act on complaint by Parish Council or meeting; while the Local Government Board can act on any complaint which they consider well founded, from whatever source it comes. No one, except the Local Government Board, has control over an urban sanitary authority. An individual who is aggrieved by reason of adequate sewers not being provided, cannot maintain an action for damages against the local authority for their neglect to perform this statutory duty, even though he can show that this neglect has caused pecuniary loss to himself (*Robinson v. Mayor of Workington*, 1897, 75 L. T. 674). Nor can he invoke the assistance of a Court of justice, instead of the Local Government Board, by an action claiming a mandamus to the local authority to perform their statutory duty (*Peebles v. Oswaldthistle Urban District Council*, [1897] 1 Q. B. 625). A local authority may, however, on an information filed in the name of the Attorney-General, be restrained from allowing their sewers to cause a permanent and serious nuisance (*A.-G. v. Mayor of Basingstoke*, 1876, 45 L. J. Ch. 726); but cannot be restrained in proceedings at the suit of a private individual. If, however, injury is caused by reason, not of the nonfeasance or failure of a local authority to perform their statutory duty, but of negligence in its performance, an aggrieved individual has a right of action (*White v. Hindley Board*, 1875, L. R. 10 Q. B. 214; *Hammond v. St. Pancras Vestry*, 1874, 9 L. R. Q. B. 157; *Blackmore v. Mile End Vestry*, 1882, 9 Q. B. D. 451).

The duty to provide sewers is nominally extended by the Rivers Pollution Act, 1876 (39 & 40 Vict. c. 75, s. 7), which requires local authorities to give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into the sewers. The local authority are not, however, bound to give such facilities, where their sewers are only sufficient for the requirements of their district, nor are they bound to admit any liquid which would prejudicially affect the sewers themselves, or the disposal of the sewage matter, or which would be injurious in a sanitary point of view. This additional statutory duty may therefore be considered as more nominal than real, as, even where the sewers are undoubtedly large enough, much manufacturing refuse may be considered unfit to enter ordinary sewers.

Sanitary authorities, in whom sewers are vested, must somehow dispose of the sewage without causing a nuisance. For this purpose they may, sec. 27, (a) construct works; (b) contract for the use of, purchase, or take on lease any land, buildings, engines, materials, or apparatus; (c) contract to supply any person with sewage, and as to the execution of works for the purpose of such supply. They are empowered by sec. 176 to purchase lands compulsorily, under the sanction of the Local Government Board. If they own, or can purchase by agreement, suitable lands within their district, and have sufficient funds, they can construct their works without first obtaining such sanction. Practically the necessity of borrowing money generally obliges them to obtain it. In case they propose to execute any such works outside their district, notices of the intended work must be advertised and the sanction of the Local Government Board obtained, after a local inquiry into the propriety of the intended work, and into the objections thereto (ss. 32-34). Unless the conditions prescribed by these sections are observed, a local authority may not execute any works outside their district (*Jones v. Conway Board*, [1893] 2 Ch. 683). Works so constructed vest in, and are under the control of, the authority who constructed them, or who may have subsequently required them, and not in the authority, within whose district they are physically situated (s. 13).

Local authorities are entitled to the easement of support for their sewers from the owners of the land through which they run. This was held to give the owners of subjacent mines the right to claim compensation from such authorities for injury sustained by interference with their ordinary rights of working their mines (*In re Dudley*, 1881, 8 Q. B. D. 86). In consequence of this decision, which imposed a heavy pecuniary liability on local authorities in mining districts, the Support of Sewers Act, 1883 (46 & 47 Vict. c. 37), was passed. The effect is to relieve the local authority from liability to make compensation, except in cases where they actually take or interfere with the working of a mine; and, on the other hand, to empower the mineowner to continue his workings when close to a sewer if the authority, after due notice, decline to compensate him (see Vesey Fitzgerald's *Public Health Act*, pp. 35-37 and 56-62).

Sec. 17 of the Public Health Act, 1875, provides that nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond, or lake, until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity or quality of the water. This is merely a declaration of previously existing law. Neither an individual nor a local authority may create a nuisance, unless expressly empowered by Parliament to do so. A local authority which pollutes a

stream are therefore liable to an action for damages at the suit of a person aggrieved (*Cator v. Lewisham Board*, 1865, 34 L. J. Q. B. 74), or to an injunction to prevent their causing injury to the public (*A.-G. v. Cockermouth Board*, 1874, L. R. 18 Eq. 172; *A.-G. v. Shrewsbury*, 1882, 21 Ch. D. 752). Unfortunately in many districts sewers were in existence, and had been fouling streams for many years, before any such section was enacted by Parliament. Persons who had acquired prescriptive rights to discharge the sewage of their premises into such sewers, still can do so. Neither they nor the local authority can be restrained (*Glossop v. Herton Board*, 1879, 12 Ch. D. 102; *A.-G. v. Dorking Union*, 1882, 20 Ch. D. 595). If, however, fresh sewage is brought into streams or into old sewers connecting with them, that is unauthorised, and may be restrained.

The Rivers Pollution Prevention Acts, 1876 (39 & 40 Vict. c. 74) and 1893 (56 & 57 Vict. c. 31), further prohibit the contamination of streams, etc., by making it an offence—(a) to cause, or (b) to knowingly permit solid or liquid sewage matter to fall or flow into any stream; and the Act of 1893 declares that where any sewage matter falls or flows, or is carried into any stream, after passing along a channel which is vested in a sanitary authority, that authority shall be deemed knowingly to permit the sewage so to fall, flow, or be carried. The mere fact, therefore, that sewage enters a stream by an old channel, and that the sanitary authority have done nothing to alter that channel, or bring the sewage along it, is no answer to a complaint under these sections. They must show that they have done their best to remedy the evil, and cannot prevent it (*Yorkshire C. C. v. Holmfirth Urban Sanitary Authority*, [1894] 2 Q. B. 842). The only body entitled under the original Act of 1876 to put the law in force was a sanitary authority, though a person interested might apply to the Local Government Board to direct the sanitary authority to take proceedings (s. 6). This practically rendered the Act nugatory in cases where the offence was caused by the local authority or by important people within their district. The Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 14), consequently gave a county council power to enforce the provisions of the Rivers Pollution Act in relation to any stream situate within or passing through or by their county. This alteration has led to the Act being put in force in many cases. The tribunal to enforce it is the County Court having jurisdiction in the place where the offence is committed.

See, further, Vesey Fitzgerald, *Public Health Acts*; Lumley, *Public Health Act*; and article COUNTY COURTS, vol. iii. p. 551.

*Arterial Land Drainage.*—The present statutory regulations for providing arterial drainage for agricultural lands date from 1531, when the statute known as the Bill of Sewers, 23 Hen. VIII. c. 5, was passed. This Act has been amended in 1708, 7 Anne, c. 10; in 1833, 3 & 4 Will. IV. c. 22; in 1841, 4 & 5 Vict. c. 45; in 1849, 12 & 13 Vict. c. 50; and, finally, in 1861, 24 & 25 Vict. c. 133. Besides these general Acts, a very large number of local Acts give special powers applicable to different districts. The Acts are complicated, and the powers given are not always sufficient to secure their object of preventing floods and ridding land of superfluous moisture. But though further legislation has been recommended and bills for the purpose have been introduced into Parliament, notably in 1881 and 1883 and 1897, they have not become law.

Under the earlier Acts, commissions of sewers may be appointed by the Crown from time to time within defined limits "to survey the walls, streams, ditches, banks, gutters, sewers, gates, calcies, bridges, trenches, mills, milldams, floodgates, ponds, lochs, bebbing-wears and other impedi-

ments, lets, and annoyances 'to the flow of water,' and the same cause to be made, corrected, repaired, amended, and put down as the case shall require" (Act of 1531, s. 2). This jurisdiction was by sec. 10 of the Act of 1833 declared to extend over "all walls, banks, culverts, and other defences whatsoever situate or being by the coasts of the sea, and all navigable rivers, streams, sewers, and watercourses, or in which the tide may ebb or flow, or which directly or indirectly communicate with any such navigable or tide river, stream, or sewer, and all walls, banks, culverts, bridges, dams, flood-gates, and other works erected or to be erected in, upon, over, or adjoining to any such rivers, streams, or watercourses"; but the Commissioners are not to interfere with ornamental works constructed near a dwelling-house, unless they first obtain the written consent of the owner or proprietor. By sec. 16 of the Act of 1861 it is provided that the powers of Commissioners acting within their jurisdiction shall extend (1) to maintenance of existing works; (2) to improvement of existing works; and (3) to construction of certain new works, *i.e.* "making any new watercourse or new outfall for water, or erecting any new defence against water, erecting any machinery, or doing any other act required for the drainage necessary supply of water for cattle, warping or irrigation of the area comprised within their limits.

Under the original Act the Commissioners had no power to execute new works (*Isle of Ely* case, 1637, 10 Co. Rep. 141). They were first empowered to execute any such works by the Act of 1833, but the power so granted was practically worthless, inasmuch as it could only be exercised when the Commissioners had obtained the written consent of the owners of three-fourths at least of the lands proposed to be charged with the costs of making such works (s. 21). The general power given by the Act of 1861 to make new works is not subject to any restriction, unless the works are costly. If the cost of improvements or new works is to exceed £1000, notices must be published describing the nature of the work, the amount of expense to be incurred, and the area within which a rate is to be levied for meeting the expense (s. 29); and, thereupon, if within two months the proprietors of half the area signify in writing their dissent, the work may not proceed. If they do not do so, their acquiescence is presumed, and the works may be carried out (s. 31).

In order to carry out their duties effectively, the Commissioners sometimes require to purchase land. They are empowered to do so for the maintenance of existing works by the Act of 1833, secs. 24-38. If land is wanted for new works it must be taken under the Act of 1861, by sec. 21 of which the Board of Agriculture can now issue provisional orders empowering them to take lands compulsorily. Funds to defray ordinary expenses are raised by means of rates, which Courts of Sewers are empowered to impose from time to time, from lands, tenements, and hereditaments within their jurisdiction, so that such lands, etc., shall contribute thereto in proportion to the benefit received, or capable of being received, from the Court (Act of 1841, s. 1). In case of improvements involving an expenditure of over £1000 on new works, the money is to be raised by a special rate, which is to be deemed to be a tax on the owners of property (Act of 1861, s. 38). The Courts may also borrow money, under sec. 41 of the Act of 1833, on the security of the lands benefited, or on the security of the general sewers rate under sec. 4 of the Act of 1841 and sec. 40 of the Act of 1861.

Prior to 1861 the Court must be put in motion by the presentment of a jury—in the nature of a grand jury who were sworn to inquire (a) into any obstruction or want of repair; (b) by whose default they were occasioned;

and (c) who was liable (Act of 1531, s. 3; Act of 1833, s. 11). If a jury has once presented that any person is liable to repair any particular work, no further presentment against him is necessary during the continuance of the Commission; but the Commissioners may from time to time order him to maintain or repair it (s. 13). The Act of 1861 (s. 33) enables Commissioners of Sewers without any previous presentment of a jury to make any order in respect of the execution of any work, etc., subject to the right of any person aggrieved to appeal to Quarter Sessions; which Court may confirm, annul, or modify the order (s. 47), or may refer the matter to the arbitration of one or more persons to be appointed by the parties, or in case of their disagreement by the Court (s. 48). Many Commissions still act solely on the presentment of a jury, and in some cases, where their powers are derived under a local Act, it may be doubtful whether the general Act of 1861 applies.

Commissions were originally issued for a term of three years, at the end of which time they lapsed unless renewed, subsequently the term was extended to ten years, and now they continue until superseded (Act of 1861, s. 14). Since that Act new Commissions are only issued or the powers or areas of existing Commissions altered, after inquiry by and on the recommendation of the Inclosure Commissioners (now Board of Agriculture). The Court is a Court of record (*Duke of Newcastle v. Clark*, 1818, 8 Taun. 602; 20 R. R. 583).

Instead of Commissioners of Sewers, nominated by the Crown, all the powers of such Commissioners may be vested in an elective drainage Board, having jurisdiction over a separate drainage district. Such Boards may be formed by the Board of Agriculture by provisional order, on the petition of not less than one-tenth in acreage of the proprietors of any area that requires a combined system of drainage, warping, or irrigation. Unless the provisional order otherwise directs, the electors are to be the persons paying the sewers rate, and to have votes according to the amount at which they are rated. The members hold office for a year, and are eligible for re-election (Act of 1861, ss. 66-71). The Act, by Schedule II., regulates the procedure of these Boards. They may delegate any of their powers to committees, consisting of such member or members as they think fit (s. 46), but a committee cannot delegate its powers (*Cook v. Ward*, 1876, 2 C. P. D. 255).

See Kennedy and Sanders on *Drains and Sewers*.

*Drainage by Private Owners.*—Many Acts deal with the drainage of land by individual owners and tenants. The Land Drainage Act, 1861, empowers any person interested in land who desires to drain the same to obtain the consent of another owner to the opening of new drains, or the cleansing, widening, straightening, or improvement of existing drains through or on the lands of such owner on such terms and on payment of such compensation as he may require (ss. 72-75). If within one month after the application such owner fail to express his assent, two justices or an arbitrator are to decide (1) whether the proposed drains or improvements will cause any injury to such owner or to the occupier or other person interested in the lands; and (2) whether any injury may be compensated in money. If the decision is that irreparable injury will be caused, the works may not be made, but otherwise the applicant is entitled to make them, in spite of the owner's dissent (s. 76). When drains have been opened or improvements made, the applicant, his heirs and assigns, are empowered for ever thereafter to clear out, scour, and maintain them in a proper state of efficiency (s. 79).

By the Public Money Drainage Acts, 1846-1856, 9 & 10 Vict. c. 101;

10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; and 19 & 20 Vict. c. 9, the Treasury were empowered to advance public money to owners of land for the purpose of improving it by works of drainage. In 1849 an Act, 12 & 13 Vict. c. 100, was passed to promote the advance of private money for drainage of lands. This latter Act was repealed in 1864, and its provisions re-enacted in the larger Improvement of Land Act of that year, 27 & 28 Vict. c. 114. Among the improvements of land contemplated by that Act are—(1) drainage and the straightening, widening, deepening, or otherwise improving the drains, streams, and watercourses of any land; (2) the irrigation and warping of land; (3) the embanking and weiring of land from the sea or tidal waters, or from lakes, rivers, or streams, in a permanent manner (s. 9). Any landowner—or owners—may apply to the Inclosure Commissioners (now Board of Agriculture) for their sanction for proposed improvements (ss. 11, 12). If they find that the proposed improvements will effect a permanent improvement in the value of the lands exceeding the yearly amount to be charged thereon, they are to give their sanction (s. 25) by provisional order (s. 27). Such order is full authority to the landowner and those employed by him to enter on the land and carry out all the improvements sanctioned by the order (s. 34). The expenses may be made a charge on the inheritance (ss. 49 *et seq.*).

By the Settled Land Act, 1882, 45 & 46 Vict. c. 38, s. 30, the enumeration of improvements in sec. 9 of the Act of 1864 is extended so as to comprise all improvements authorised by the later Act. Drainage in all forms is among the improvements so authorised (see s. 25). Capital money in settlement may therefore be expended on such works (s. 21 (119)); and if a certificate from the Board of Agriculture, or of a competent engineer or practical surveyor named by them, is obtained, trustees may apply money in their hands in payment for them (s. 26).

[*Authorities.*—See, in addition to the authorities mentioned in the text, the list appended to the article PUBLIC HEALTH.]

**Drawbacks.**—See CUSTOMS, *ante*, p. 80.

**Drawing.**—One of the optional subjects of education under the Day School Code, 1894 (par. 15 (b)).

**Drawings.**—See COPYRIGHT, vol. iii. p. 397.

**Dredging.**—See FISHERIES.

**Driftway** is a way along which a man has a right to drive cattle. Every man has a right to drive cattle along the Queen's highway; but such a right will not be presumed in the case of any other way; it must be proved by grant or prescription. Long user of the way as a bridle-path or a carriage-way is evidence from which a right to ride a horse or drive a carriage there may be inferred; but this does not—necessarily, at all events—involve the right to drive loose cattle along that way (*Ballard v. Dyson*, 1808, 1 Taun. 279; 9 R. R. 770). See BRIDLE-PATH, vol. ii. p. 247, and 17 & 18 Vict. c. 97, s. 9.



**Drilling, Unlawful.**—Drilling and training men in military exercise or the use of arms, if done with the object of overturning the Government, seems to be an overt act of treason (*R. v. Hunt*, 1819, 1 St. Tri. N. S. 171; *Redford v. Birley*, 1822, 1 St. Tri. N. S. 1071, at p. 1257). If the object is to overawe the Government, excite tumult, offer resistance to the civil power, secure the attendance of the persons drilled at seditious meetings, or to give confidence by an appearance of strength to disaffected persons, the drilling is unlawful at common law, *i.e.* the assembly for drilling is an unlawful assembly (*s. c.*)

The legality of drilling of persons not under military law or discipline was first brought into prominence in 1819, by the proceedings in Lancashire in furtherance of electoral reform, which culminated in the tragedy of Peterloo and the prosecution in *R. v. Hunt*, 1819, 1 St. Tri. N. S. 171, owing to the ruling of the judges in that case that drilling without arms merely for the purpose of going to a public meeting was illegal (*cp. R. v. Dewhurst*, 1820, 1 St. Tri. N. S. 529). See ASSEMBLY, UNLAWFUL. And owing to the prevalence of training in Lancashire and Yorkshire legislation was considered necessary in the interests of government as then understood (41 Cobbett Parl. Deb. 851), and the Unlawful Drilling Act, 1819 (60 Geo. III. and 1 Geo. IV. c. 1), was passed. Under that Act it is illegal for persons to meet or assemble for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercises, movements, or evolutions, except under lawful authority from the Crown or the Lord Lieutenant, or two justices of the peace for the county in which the meeting is (*s. 1*).

It is not quite clear whether this provision creates a substantive misdemeanour, or whether it merely defines the general elements of the two offences next to be described.

Persons who attend such a meeting to train or drill others, or who train or drill others at such meeting, or assist to do so, are guilty of felony, and punishable by penal servitude, from three to seven years, or imprisonment for not over two years (60 Geo. III. and 1 Geo. IV. c. 1, s. 1; 20 & 21 Vict. c. 3; 54 & 55 Vict. c. 69, s. 1).

Persons attending to be drilled or trained, etc., or being trained or drilled, etc., are guilty of misdemeanour, and punishable by fine or by imprisonment for not over two years (60 Geo. III. and 1 Geo. IV. c. 1, s. 1; 54 & 55 Vict. c. 69, s. 1).

It is said that this offence is not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1 (16); Archbold, *Cr. Pl.*, 21st ed., 907); but the Act itself (*s. 2*) speaks of committal for trial at Quarter Sessions.

Prosecutions must be commenced within six months of the offence (60 Geo. III. and 1 Geo. IV. c. 1, s. 7). But it is not essential to state in the indictment the date of the offence (*R. v. Hunt*, 1748, 3 Cox C. C. 215). The offences under the Act are alternative to any other offence contributed by or incidental to the particular unlawful meeting (60 Geo. III. and 1 Geo. IV. c. 1, s. 4; 52 & 53 Vict. c. 63, s. 33).

Meetings forbidden under the Act may be dispersed by justices or the police, and persons present may be arrested or detained without warrant. An arresting justice may commit the offenders to the assizes, unless sufficient bail is given (60 Geo. III. and 1 Geo. IV. c. 1).

Indictments on this Act have been rare in England, and since the Chartist doings of 1848, almost if not quite unknown. (See *R. v. Hunt*, 1848, 3 Cox C. C. 215.)

**Illegal drilling** has been and is of far more frequent occurrence in Ireland (*Gogarty v. R.*, 1849, 3 Cox C. C. 306).

**Drinking Fountains.**—Drinking fountains for the gratuitous supply of drinking water to persons or animals in the public streets, have usually been provided by private benefactions; and when provided have been vested in trustees for the public benefit. Where not so vested, but given to, or used by, the public prior to 1875, they are vested in the local authority of the district (38 & 39 Vict. c. 55, s. 64).

The local authority may cause such works to be maintained and plentifully supplied with pure and wholesome water; or may substitute for them and supply other such works equally convenient. In London, similar powers are given to the sanitary authorities of different districts, who are further empowered to provide and maintain public wells, pumps, and drinking fountains in such convenient and suitable situations as they may deem proper (54 & 55 Vict. c. 76, s. 51). Outside London there seems to be no express power for a local authority to erect drinking fountains, but merely a power to maintain fountains already existing and to keep them supplied. Where fountains are vested in trustees or private individuals, those persons must provide the requisite water. They cannot require the local authority to procure a supply or provide it gratuitously.

**Driving.**—Penalty on furious driving (see 5 & 6 Will. IV. c. 50, ss. 7, 8; 24 & 25 Vict. c. 100, s. 35); cab-driver (see CAB); omnibus or stage carriage driver in the county of London (see 6 & 7 Vict. c. 86, s. 28; 13 & 14 Vict. c. 7; 32 & 33 Vict. c. 115); regulations as to drivers within the metropolitan police district (2 & 3 Vict. c. 47, s. 54); driving cattle, or more than four horses at once, or a cart laden with timber, ladders, etc., exceeding 35 ft. in length, except between 10 a.m. and 7 p.m., in specified places in the metropolitan police district (30 & 31 Vict. c. 134, ss. 7, 16).

**Droit d'angarie** is the right to detain, to use, and even, if necessary, to destroy property belonging to neutral States in time of actual warfare. All jurists recognise this as an undoubted belligerent right—Hall, De Martens, and Bluntschli, without any reservations; but Heffter and others seem unwilling to admit a principle justly regarded by them as a great curtailment of neutral rights. In practice, the right of angary was sanctioned by both England and Austria during the Franco-German war, the former in the case of the German seizure of English vessels required for the blocking-up of the Seine, and the latter in the case of some Austrian rolling stock which was seized and converted into use, though subsequently restored.

[*Authorities.*—Hall, *International Law*, Oxford, 1895, p. 765; Bluntschli, *Droit Int. Codifié*, trans. Lardy, Paris, 1886; Heffter, *Droit International*, s. 150, trans. Bergson, Paris, 1883.]

**Droit d'aubaine** was the right of the French sovereign to attach the moveable and immoveable property of a deceased alien, notwithstanding the claims of the alien's testamentary, legal, or ab-intestate successors. It was abolished in 1819.

**Droit de Renvol** is a right States are supposed to possess to exclude or expel aliens from their territory (see EXCLUSION; EXPULSION).

**Droits of Admiralty.**—See ADMIRALTY, THE, (vol. i. p. 146).

**Drover.**—See DRIVING and SUNDAY. A special penalty is imposed on a drover found drunk on a highway, by sec. 12 of the Licensing Act, 1872.

**Drowning.**—See MURDER; SUICIDE; MINES.

**Druggist.**—See CHEMIST.

**Drugs.**—See ADULTERATION; POISON.

**Drunkenness.**—The law as to the *civil capacity* of drunkards is identical with the law as to the civil capacity of insane persons. The whole subject is discussed in the article LUNACY. Here it may suffice to cite a few leading authorities—*Molton v. Camroux*, 1848, 2 Ex. Rep. 487; 1849, 4 *ibid.* 17 (which must now be compared with *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599 (contract)); *Matthews v. Baxter*, 1873, L. R. 8 Ex. 132; and see Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 2; Co. Rep. iv. 123 (b), n, and *Ayrey v. Hill*, 1824, 2 Add. 209 (testamentary capacity, where the evidence to be adduced in such cases is discussed); and cp. the American cases of *Peck v. Carey*, 1863, 27 N. Y. 9, and *Julke v. Adam*, 1863, N. Y. Surr. 1, Redf. 454.

The law as to the *criminal responsibility* of drunkards differs from that as to the criminal responsibility of insane persons, or, at least, presents special features which must be briefly examined here. According to Coke (*Co. Lit.* 247), the drunkard (whom he described as *voluntarius daemon*, the state being *dementia affectata*) has no privilege in consequence of his condition, "but what hurt or ill soever he doeth, his drunkenness doth aggravate it." Hale (P. C. 32) restated this proposition in a more accurate form, namely, that a person suffering from this voluntarily contracted madness "shall have the same judgment as if he were in his right senses," and admitted the existence of two "allays"—(1) temporary frenzy induced by the unskilfulness of a physician, etc.; (2) habitual or fixed frenzy, caused by drunkenness.

In *R. v. Grindlay*, 1819, cit. 1 Russ. on *Crimes*, 6th ed., 144, Holroyd, J., said that drunkenness might properly be considered by a jury where the question is whether the prisoner's act was premeditated or not. This dictum was, however, disapproved of in *R. v. Carroll*, 1835, 1 Car. & P. 145, and according to *R. v. Meakin*, 1836, *ibid.* 297, would be peculiarly erroneous where a prisoner employed a dangerous or deadly weapon. It has, however, met with some degree of recognition in Scotland. Drunkenness may be material, however, to the question whether there was capacity to form a criminal intent; cp. *R. v. Cruse*, 1838, 8 Car. & P. 541; *R. v. Monkhouse*, 1849, 4 Cox C. C. 55; *R. v. Doherty*, 1887, 16 Cox C. C. 306; *R. v. Moore*, 1852, 3 Car. & Kir. 319.

Drunkenness is also a factor of which a jury may take account where a prisoner acted in self-defence (*R. v. Gamlen*, 1858, 1 F. & F. 90), or under provocation (*R. v. Monkhouse*, *supra*; *R. v. Thomas*, 1837, 7 Car. & P. 817; *Pearson's case*, 1835, 2 Lew. C. C. 144; *Burrow's case*, 1823, 1 Lew. C. C. 75; *Marshall's case*, 1830, *ibid.* 76; *Goodier's case*, 1831, *ibid.* n.). In *Rennie's case*, 1825, 1 Lew. C. C. 76, and in *R. v. Davis*, 1881, 14 Cox C. C., per Stephen, J., at p. 564, it was laid down that drunkenness is no excuse for crime unless the mental derangement arising from it is fixed and continuous. But this ruling has been departed from at *Nisi Prius* (cp. *R. v. Baines*, *Times*, Jan. 1, 1886, per Day, J.). Involuntary drunkenness, resulting from a temporarily diseased condition, will exempt a prisoner from responsibility; cp. *R. v. Mary R.*, 1887, cit. Kerr's *Inebriety*, 2nd ed., p. 395; and *R. v. Mountain*, April 1888, Leeds Assizes, per Pollock, B.—both, however, *Nisi Prius* cases. See further HABITUAL DRUNKARD; INEBRIATES ACTS; INTOXICATING LIQUORS; POLICE; SHIPPING (as to intoxication of master, pilot, passenger).

[*Authorities*.—Russ. on *Crimes*; Pope on *Lunacy*, 2nd ed.; Wood Renton on *Lunacy*, pp. 911–913.]

**Dry Rent**.—Another name for rent seck, which was a rent issuing out of land, and which was so called because it could not be distrained for. As such rents were, however, made distrainable by 4 Geo. II. c. 28, s. 5, the term has now no meaning; rents since that statute being divisible into (1) chief rents, (2) rent charges, and (3) rents incident to a reversion. [Hood and Challis, *Conveyancing and Settled Land Acts*, 4th ed., p. 117.]

**Due**.—As the effect of the Statute of Limitations is only to bar the remedy for a debt, and not to destroy it, the debt still remains “due.” So where an order obtained on the application of the judgment debtor himself directed an account of what was “due” to his judgment creditor, it was held that the debtor could not avail himself of the statute, although he might have used it as a defence to proceedings taken against him by the creditor (*Ex parte Cavley*, 1889, 34 S. J. 29).

Where a testator directed his executors “to forgive to any tenant all rent or arrears of rent which may be due and owing from him at the time of my decease,” it was held that the effect of this direction was to forgive to the tenant the rent due at the quarter day preceding the testator's death, and that the Apportionment Act, 1870, did not affect the bequest so as to entitle the tenant to be forgiven the rent down to the date of the testator's death (*In re Lucas, Parish v. Hudson*, 1885, 55 L. J. Ch. 101).

Where an operative is engaged on a weekly hiring, and he or she leaves work before the end of the week, no wages are “due” within sec. 11 of the Employers and Workmen Act, 1875; it is otherwise if the operative is employed to do piece-work.

The word “due” may mean either owing or payable, and what it means is determined by the context (per Jessel, M. R., in *In re Stockton Malleable Iron Co.*, 1875, 2 Ch. D. 101). See Stroud, *Jud. Dict.*

**Due Attestation**.—See ATTESTATION; BILLS OF SALE.

**Due Cause.**—As to removal of official liquidator under sec. 93 of the Companies Act, 1862, on “due cause” shown, see vol. iii. p. 218.

**Due Course.**—As to the holder of a bill of exchange “in due course,” see vol. ii. pp. 99, 104).

**Due Course of Administration.**—As to, see *Scott v. Moore*, 1844, 13 L. J. Ch. 283.

**Due Diligence.**—As to meaning of in sec. 32 of the Patents Act, 1883, see article PATENTS.

**Due Inquiry.**—“Due inquiry” must be made before the General Medical Council can, under sec. 29 of the Medical Act, 1858, direct the registrar to erase a practitioner’s name from the medical register for professional misconduct. As to meaning of, see *Allbutt v. General Medical Council*, 1889, 23 Q. B. D. 400; *Leeson v. General Medical Council*, 1890, 38 W. R. 303).

**Due Regard.**—The Charity Commissioners, in dealing with a scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons are entitled, must, by sec. 11 of the Endowed Schools Act, 1869, have “due regard” to the educational interests of such class of persons; and a similar duty is imposed by sec. 5 of the Endowed Schools Act, 1873. Any substantial privilege adapted to the altered construction of the school, given to the particular class of persons in lieu of the privileges abolished, is a compliance with the direction to have “due regard” to their interests (*In re Hemsworth Free Grammar School*, 1887, 12 App. Cas. 444; see also *In re Hodgson’s School*, 1878, 3 App. Cas. 857; *In re Sutton Coldfield Grammar School*, 1881, 7 App. Cas. 91; *Ross v. Charity Commissioners*, 1882, 7 App. Cas. 463).

**Duel.**—In English law the duel is known in two senses:—

1. As a form of judicial combat the duel was legal until 1819. See BATTLE, CONSTABLE AND MARSHAL. At present the title and functions of the ancient office of royal champion, still held by the Dymokes of Scrivelsby, are the sole remaining vestiges of this mode of testing legal right.

2. Theoretically the English law has always refused to recognise as legal any form of duel, except that above mentioned, carried on under the forms of law. Jousts and tournaments, even those held under royal sanction or patronage, were condemned as unlawful (*R. v. Coney*, 1882, 8 Q. B. D. 534, 549, per Stephen, J.). Killing men in CHANCE MEDLEY (*q.v.*), i.e. on a sudden quarrel, was also illegal.

James I., while only King of Scots, had passed a law (Scots Acts, 1600, c. 12, and see 1696, c. 35) making it murder to kill a man in a duel held without royal sanction. Immediately on his accession to the English Crown he procured the passing of the Statute of Stabbing (1 Jac. I. c. 8) against killing, even on sudden provocation, with daggers: an Act said to

have been rendered necessary not merely by the personal aversion of that king to cold steel, but also and chiefly by the propensities of his Scotch retainers (see Foster, *Cr. Law*, 2nd ed., 297). In 1613 he issued his royal edict (Inner Temple Tracts, 11 K. 3) against private combats in the field on challenge, whether within or without the realm,—and against the combatants, their seconds, accomplices, and adherents. This edict, and the Star Chamber decree on the subject, Jan. 26, 1614 (Spedding's *Bacon*, iv. 409), of course, never had the force of law, but from their issue may be dated the continuous and finally successful hostility of the King's Courts (see *R. v. Tavernier*, 1629, 3 Bulst. 172) to all forms of duelling, from which it results that though the word "duel" is only once named in the statute book, every step towards or during a duel is an indictable offence, and a duel is not regarded as an affair of honour, but as an unlawful assembly in cold blood for the purpose of assaults with lethal weapons to avenge some insult or settle some quarrel.

(a) Sending a challenge to fight a duel is incitement to a breach of the peace, or an unlawful assembly (1 Russ. on *Crimes*, 6th ed., 593; *R. v. Master*, 1848, 5 Cox C. C. 356). Carrying the challenge when the messenger is not an innocent agent is the same offence (*R. v. Morgan*, 1780, 1 Doug. 314; *R. v. Young*, 1835, 4 Nev. & M. K. B. 850). Provoking a man by speech or writing to fight a duel (apart from any question of defamation) is an offence of the like nature (Rot. Parl. (11 Hen. iv.), vol. iii. pp. 630, 632; *R. v. Philipps*, 1805, 6 East, 464; 5 R. R. 712; and cp. *R. v. Adams*, 1888, 22 Q. B. D. 66; Steph. Dig. *Cr. Law*, 5th ed., p. 54). This was a Star Chamber matter (see *A.-G. v. Kelly*, 1632, Star Ch. Ca. Camden Society Publ., p. 112). In the case of the commission of any of these offences the person challenged instead of indicting may swear the peace on the offender. See ARTICLES OF PEACE.

(b) If a duel takes place in a public place it is an AFFRAY (Russ. on *Crimes*, 6th ed., 588).

(c) In the view of some judges a meeting anywhere for a duel is an unlawful assembly, and all persons present aiding and abetting, such as seconds, etc., are liable as principals, if they are more than mere voluntary or casual spectators (*R. v. Coney*, 1882, 8 Q. B. D. 534).

(d) A duel even in a private place is an assault by each principal on the other with lethal weapons, to which his consent is no defence in view of the public interest in the matter (*R. v. Coney*, 1882, 8 Q. B. D. 534 at 549, per Stephen, J., at 553, per Hawkins, J.).

(e) If one principal is wounded, the other is indictable for unlawful wounding, wounding with intent to do grievous bodily harm, or attempt to murder (24 & 25 Vict. c. 100, ss. 14, 18, 19, 20; *Lord Cardigan's case*, 1841, 4 St. Tri. N. S. 601). In Scotland, the last-named offence is still capital (10 Geo. iv. c. 38, s. 2).

(f) If either combatant is killed, the other is indictable for murder or manslaughter, as are the seconds and doctor, according as the fight was on a sudden quarrel and immediate duel, or after appointment in cold blood (Foster, *Cr. Law*, 2nd ed., 297; *R. v. Tavernier*, 1617, 3 Bulst. 171; *R. v. Oneby*, 1795, 2 Stra. 766; *R. v. Murphy*, 1833, 6 Car. & P. 103; *R. v. Young*, 1835, 6 Car. & P. 644; *In re Barronet*, 1852, 1 El. & Bl. 1). Duels between soldiers on active service were capital under the old law of arms (see Rot. Parl. i. 172, 1881). Persons subject to military law are forbidden by sec. 38 of the Army Act (44 & 45 Vict. c. 58), to fight, promote, be concerned in, or connive at a duel, under penalties imposable by court-martial; and the Army Regulations, sec. vii. s. 2, require commanding

officers to discourse on the impropriety of duelling from a false sense of honour.

[*Authorities*.—1 Hale, *Hist. Pl. Cr.* 471, 479; Hawk., P. C., bk. i. c. 31, ss 20–35; Russ. on *Crimes*, 6th ed.; Foster, *Cr. Law*, 2nd ed., 297; Arch. *Cr. Pl.*, 21st ed., 12, 722; i. 588, 593, 695; iii. 57, 284; Mayne, *Indian Crim. Law*, 1896, pp. 393, 611.]

**Duffing**.—A dishonourable practice which was said formerly to prevail in the pawnbroking trade, of rubbing up soiled or damaged goods and selling them as new, or re-pledging them with other pawnbrokers. To charge a pawnbroker with “duffing” is actionable, whether the words be written or spoken (*Hickinbotham v. Leach*, 1842, 10 Mee. & W. 361).

**Dum casta vixerit**.—See JUDICIAL SEPARATION; SETTELEMENTS.

**Dum se bene gesserit**.—See OFFICE.

**Duplicate**.—*Bill of Exchange*.—If a bill has been lost before it is overdue, the drawer can be compelled to give a duplicate to the holder upon an indemnity and security (Bills of Exchange Act, 1882, s. 69, *ante*, vol. ii. p. 106). As to bills in a set, see *ibid.*, sec. 71, and vol. ii. p. 106.

*Will*.—When a will executed in duplicate is proved, only one copy is admitted to probate, both being deposited in the registry (Tristram and Coote's *Probate Practice*, 10th ed., p. 52; *Killican v. Parker*, 1754, 1 Lee, 662). The will is revoked by burning, tearing, etc., either copy *animo revocandi* (*Boughey v. Morton*, 1758, 3 Hag. Con. 191 n). And if one copy was retained by the testator and cannot be found at his death, the will is presumed to have been so revoked (*Jones v. Harding*, 1887, 58 L. T. 60).

**Duplicity**.—Under the common law rules of pleading a count or plea was held bad for duplicity when it alleged several distinct matters in support of a single cause of action or indictment, or more than one distinct answer to the claim or charge in the same plea. Immaterial averments were rejected, and not regarded as pleading double; nor was mere matter of inducement, nor a multifarious statement of matters all going to form a single answer so regarded. Where causes of action or indictment could lawfully be joined, they must have been stated in distinct counts which operated cumulatively or alternatively, but alternatives of fact or law could not be stated in the same count or plea; and where more than one ground of defence existed, unless by statute the plea of the general issue or not guilty was permitted, the different defences must be stated in separate pleas which operated alternatively. So far as concerns criminal pleadings these rules are still theoretically in force. The proper mode of attacking a double count or plea was by special demurrer. See DEMURRER.

The whole law on the subject of double pleading in civil cases has now been superseded as to the High Court by the Judicature Acts and Rules, and the only remedy now for such pleading is either by summons to strike it out as embarrassing or on taxation of costs, unless a question of law arises which is raised by the opposite party on his defence or reply (see Stephen, *Pleading*).

**Duress.**—See COERCION.

**Durham, County Palatine of.**—A County Palatine, according to Blackstone (Intro. s. 4), is so called a *palatio*, because the owner, in this case the Bishop of Durham, had in it *jura regalia* as fully as the king. As to the origin of the palatine power of the bishops of Durham, which is believed to be nearly coeval with the See itself, see Sir Thomas Duffus Hardy's Introductions to vols. i. and ii. of the *Registrum Palatinum Dunelmense*, in the Rolls Series; and for an enumeration of the *jura regalia*, see the Introduction to Williamson's *Palatine Court of Durham Act*, 1889, p. 8. Under the Acts 6 & 7 Will. iv. c. 19, and 21 & 22 Vict. c. 45, the palatine jurisdiction is separated from the bishopric and vested, with the *jura regalia*, in the Crown. Of the old local judiciary, the Chancery Court of the County Palatine alone remains, and has been materially strengthened by the Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47). This empowers the "Chancellor of the County Palatine of Durham and Sadberge," with the concurrence of the Lord Chancellor, to adopt and modify any rules or orders of the High Court for the purposes of the Court of the County Palatine (s. 1); gives a right of appeal to the Court of Appeal instead of direct to the House of Lords as formerly (s. 11); provides for service of process upon persons out of the jurisdiction (s. 2); enables an order to be enforced out of the jurisdiction by being made an order of the High Court of Justice (s. 3); and extends to the Palatine Court certain statutory powers of the High Court (ss. 6-10). Cp. Williamson, *op. cit.* Under 21 & 22 Vict. c. 45, the foreshore of Durham is vested in the Crown (s. 2), but the rents and proceeds therefrom derived are divisible equally between the Crown and the Ecclesiastical Commissioners (s. 4). The Durham foreshore is also expressly exempted from the transfer of management under 29 & 30 Vict. c. 62 to the Board of Trade, and remains under the management of the Commissioners of Woods.

**During.**—A covenant in a marriage settlement that all property coming to the wife "during the coverture" shall be settled as therein mentioned, is rendered inoperative so long as a decree of judicial separation obtained by her is subsisting; she is therefore absolutely entitled to all property coming to her during the subsistence of the decree as if she were a *feme sole* (*Dawes v. Creyke*, 1885, 30 Ch. D. 500; see also *Waite v. Morland*, 1888, 38 Ch. D. 135, and *In re Coward & Adam's Purchase*, 1875, L. R. 20 Eq. 179, and other cases collected in Stroud's *Judicial Dictionary*, 232, 233).

A husband and wife, when before the Divorce Court, agreed in writing that if judicial separation were decreed, the wife should be entitled to certain furniture "during her life," but that if she annoyed her husband her enjoyment of the same was to cease. A decree of judicial separation was made, but subsequently the parties resumed cohabitation; it was held that the agreement thereupon came to an end (*Nicol v. Nicol*, 1886, 31 Ch. D. 524).

A bequest to a married woman living with her husband of a weekly sum "during such time as she may live apart from her husband" is void, as it is a gift to be made during a period the commencement and duration of which are fixed in a way the law does not allow (*In re Moore, Trafford v. Maconochie*, 1888, 39 Ch. D. 116).

A bequest to two or more persons "during their natural lives" is a



bequest to them or the survivor of them (*Alder v. Lawless*, 1863, 32 Beav. 72; *Neighbour v. Thurlow*, 1860, 28 Beav. 33).

A covenant in a lease that the lessee shall quietly enjoy the estate "during the term" discharged from tithes is broken by a suit for them after the expiration of the term (*Lanning v. Lovering*, 1602, Cro. (1) 916).

"During the said term," see Woodfall, *Landlord and Tenant*, 14th ed., 699; Stroud, *Judicial Dictionary*, *supra*.

**Dust.**—See SCAVENGING.

**Dwellings, Labourers'.**—See ARTISANS.

**Dying Declarations.**—See DECLARATIONS OF DECEASED PERSONS.

**Dynamite.**—See EXPLOSIVES.

**Each.**—A gift to "each" of two or more persons, or to each of their "respective heirs," creates a tenancy in common (*Gordon v. Atkinson*, 1849, 1 De G. & Sm. 478; see also *Ex parte Tanner*, 1855, 24 L. J. Ch. 657; Jarman, *Wills*, 5th ed., p. 1122).

As to the word "each" in a contract or bond: Where a debt was contracted, and a bond made by which A, B., and C., "acknowledge themselves bound to the plaintiffs in £1000 each, for which they bind themselves and each of them for himself, for the entire sum of £1000," the Court held that this was a several bond only (*Collins v. Prosser*, 1823, 1 Barn. & Cress. 682; 25 R. R. 540).

**Earl Marshal.**—The Earl Marshal was one of the great officers of State under the Norman kings. With the Lord High Constable, who was the king's general, he shared the command of, and had also the special duty of marshalling, the feudal forces, and of ascertaining and enforcing feudal military services. These two officers were also the judges in the Court of the CONSTABLE AND MARSHAL or Court of Chivalry. The Earl Marshal was *ospre* a judge of the Court of the Marshalsea (3 Kerr's *Black. Com.* p. 42).

After the forfeiture of the office of constable on the attainder of the Duke of Buckingham in 1521 a controversy arose as to whether the Court could be held by the Earl Marshal alone; and it was determined in contrary senses on several different occasions during the seventeenth century, but has never been settled; the jurisdiction of the Court being so doubtful became obsolete, though it was never formally abolished. (See generally as to the Court of Chivalry, Coke, *Inst.* Part IV. pp. 122-128; Coke on *Littleton*, *Harg. and But.*, vol. i. 74 b, Note (1); and Tytler, *Military Law*, App. II. pp. 393-399.)

The King's Bench, during the above-mentioned controversy, decided that the Earl Marshal could by himself hold a Court in matters concerning

arms and honour. In this respect, too, however, the jurisdiction of the Court has become obsolete. The last two or three cases were about a hundred and fifty years ago; and the Court has no means of enforcing its decisions upon any of the matters of which it is supposed to have cognisance.

The heralds had always been attendant upon the Court, and they remained under its orders, and, after the forfeiture of the office of constable, under the superintendence of the Earl Marshal. In the College of Arms are the Earl Marshal's books relating to proceedings in the Court, and whatever relates to the office of Earl Marshal and the superintendence of the college. The Earl Marshal has the right of nomination of the heralds and others, to their offices in the college, to be granted by the sovereign; and under warrant from the sovereign he presides at, and performs, the ceremonies on their creation. (See Noble's *College of Arms*, pp. 193, 223-226, 273-295, 301.)

In 1692 Charles II. granted the office and dignity to Henry, Lord Howard, and to his heirs; and under this grant the office is now held by the Duke of Norfolk.

[*Authorities.*—*Manual of Military Law*, pp. 9-12; *ARMY*; *ARMORIAL BEARINGS*.]

### Early Closing.—See LICENSING.

**Earmark**—A mark of identity or ownership (*Murray's Dictionary*). Money is said "to have no earmark." The maxim means no more than that if it be paid for value to one who receives it honestly and without notice that it is not the payor's money, the payee cannot be compelled to refund the amount, although the payor had, in fact, no right to the money.

Lord Mansfield said this is because it passes "as currency" (*Miller v. Race*, 1758, 1 Burr. at p. 457). The rule never applied to money placed in a bag or otherwise kept apart (*Taylor v. Plumer*, 1815, 3 M. & S. at p. 575, per Lord Ellenborough), and in modern times, at anyrate, it has been understood as above stated (see the judgment of Jessel, M. R., *In re Hallett's Estate*, 1879, 13 Ch. D. 696).

So money paid to, or received by, an agent or trustee for a specific purpose, or fixed with a trust, can be followed in his bankruptcy (*Harris v. Truman*, 1882, 9 Q. B. D. 264; *Ex parte Cooke*, 1876, 4 Ch. D. 123; *Gilbert v. Gonard*, 1884, 54 L. J. Ch. 439), or into the hands of anyone, e.g. his banker, who has received it from the agent or trustee with notice that it is not the latter's own money (*Ex parte Kingston*, 1871, L. R. 6 Ch. 632), even though it has been mixed with other moneys (*In re Hallett's Estate*, *supra*).

The proceeds of money wrongfully dealt with by a trustee or agent can also be followed, except as against a purchaser for value without notice, and the owner of the money has an equitable lien on them for the amount of the money (*Lewis v. Madocks*, 1810, 17 Ves. at p. 57; 11 R. R. 18; *Hopper v. Conyers*, 1866, L. R. 2 Eq. 549). See Lewin on *Trusts*, 9th ed., pp. 1019-1029.

**Earnest**—A coin or some other thing of value given by a buyer to signify the conclusion of a bargain between him and the seller. The buyer

loses the earnest if he fails to perform his part of the contract; and he is entitled to its return if the seller makes default. It is necessary that something should actually pass to the seller; the mere passing a coin over the seller's hand is not sufficient (*Blenkinsop v. Clayton*, 1817, 7 Taun. 596; 18 R. R. 602). The giving of earnest by the buyer is one of the modes of binding a contract for the sale of goods of the value of £10 or upwards, which obviates the necessity of having a note or memorandum of the contract in writing (Sale of Goods Act, 1893, s. 4). See the history and effect of giving of earnest treated by Fry, L.J., in *Howe v. Smith*, 1884, 27 Ch. D. 89.

**Earnings.**—This word in sec. 21 of the Divorce and Matrimonial Causes Act, 1857, is confined to the lawful earnings of a lawful industry, and does not extend to the proceeds of prostitution (*Mason v. Mitchell*, 1865, 34 L. J. Ex. 68).

In sec. 3 of the Employers' Liability Act, 1880, the word means things like money, food, clothes, and shelter; it does not include the value of tuition which an apprentice receives from his employer (*Noel v. Redruth Foundry Co.*, 1896, 65 L. J. Q. B. 330). See Stroud, *Jud. Dict.*

**Easement.**—Easements are a class of legal rights similar in many respects to the servitudes of the Roman law. They are rights which the owner of land or buildings has for his own benefit in respect of his property, and to be used in connection therewith, in or over the property of his neighbour. In an old book called *Termes de la Ley*, an easement was defined to be "a privilege that one neighbour hath of another by writing or prescription, without profit, as a way or sink through his land, or such like." But this is obviously insufficient as a definition, though it was judicially quoted with approbation by Bailey, J., in *Hewlins v. Shippam*, 1826, 5 Barn. & Cress. p. 229. This definition would embrace many rights that are not easements, for easements have many essential characteristics not shared by them (see the fuller definition by Goddard on *Easements, and the explanation of it*, 5th ed., ch. i. p. 2). According to this latter definition (which adopts the term used in *Termes de la Ley*), an easement is a *privilege*; that is, it is not a right to land or to any corporeal interest in land; it is a mere right of user or enjoyment of some right, in or over another's soil, which does not deprive the owner of the possession of his land, though it may, and probably does, in some way curtail his rights as owner. Thus a right-of-way does not render the soil any less the property of the landowner, though it will curtail the right he otherwise would have of building a wall or digging a pond on the site of the way. The next characteristic of an easement is that it is a right *without profit*. This distinguishes an easement from a *profit à prendre*, which is a right to enter another person's land and take something from it, as fish from a lake, or wood for firing, or stones for mending roads, or right of common. The next is that an easement must be possessed *in respect of some corporeal hereditament* to which it is appurtenant, that is, it is intended for the beneficial enjoyment of the latter, and cannot be severed from it by conveyance, will, or otherwise; and it passes with it to a purchaser or devisee of that hereditament. This hereditament is commonly called the "dominant tenement," while the land or building over which the easement is exercised is called the "servient tenement." As to the latter, it is to be observed that, from the mere

nature of the right, it must be the property of some person other than the owner of the dominant tenement, for any right a man may exercise in his own land he exercises as owner of the land—it is one of his proprietary rights, and not an easement. Thus if a man possesses two adjoining fields, and chooses to make a road over one to the other, the right to use the road is the owner's because the soil is his, and he can do what he likes with his own; but in the case of an easement of right-of-way over another's land, he is not the owner of the soil, and can only use his right in the manner and to the extent appointed by the owner of the servient tenement. The owner of the easement is called the "dominant owner," and the owner of the servient tenement is called the "servient owner." This feature of easements, that is, that there must be a "dominant tenement" or estate to which the right is attached, and in respect of which only the right can be used, excludes an important class of rights from the law of easements sometimes called rights *in gross*, that is, rights belonging to persons over the land of others, given to them personally and independently of any estate, and public rights. An important instance of this class of rights is a right of public way, which is a right belonging equally to every individual member of the community. And as instances of other rights of the same class may be mentioned—rights to pitch tents in fairs and markets, public rights of fishing in rivers, and private rights granted to individuals by covenant, and not in respect of any property. Another characteristic of an easement is that it must exist and be used for the beneficial enjoyment of the dominant tenement only. Lord Brougham said, in *Keppel v. Bailey*, 1834, 2 Myl. & K. p. 535, that it would be a novel incident attached to land that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is owner and occupier, have a right of road over other land; and speaking of a right claimed to cut wood, without any allegation that the wood when cut was to be used for the benefit of the dominant tenement, Byles, J., said, in *Bailey v. Stevens* (1862, 12 C. B. N. S. 91), "How can such a right as this be claimed by the occupier of land as such? It is in no way connected with the enjoyment of the land occupied. A man might as well try to make a right-of-way in Kent appurtenant to an estate in Northumberland." On this principle it was held that a waterworks company could not take water from a stream, which they might have used lawfully for the benefit of land they owned adjoining the stream, to supply a town at a distance (*Swindon Waterworks Co. Limited v. Wilts and Berks Canal Co.*, 1875, L. R. 7 H. L. 697). Another distinctive feature of an easement is that it can only impose an obligation on the servient owner to suffer or refrain from doing something on his own tenement for the advantage of the dominant owner. The first remark on this is that an easement is a right by which an obligation is imposed, not on the person of the servient owner, but on him with reference to his estate; and therefore any obligation imposed on him personally to do something, for instance, to build or keep in repair a wall, or to pump and supply water, is not an easement. On this principle it was held that the grantor of a right-of-way, that is, the servient owner, is not bound to repair the way, but that the obligation to do that is on the dominant owner (*Pomfret v. Ricroft*, 1 Wms. Saund.). The obligation on the servient owner is of a negative character only, that is, to suffer or refrain from doing something. Thus, in case of a right-of-way, he has to suffer the dominant owner to walk over his land; and in the case of ancient light, to refrain from obstructing it; and in the case of a right to support, to refrain from destroying the support. It is true that a servient owner, when grant-

ing the easement, may bind himself to some active obligation as to repair a way; but such a duty is not one of the ordinary obligations of an easement, and it is doubtful if it would be more than a mere personal obligation, which would not pass to a future owner of the servient estate.

The difference between easements and licences in the nature of easements should be noticed. It is an old principle of law that an incorporeal hereditament can only be granted by deed, and thus, that a deed is necessary for the creation of an easement. It is true that easements can be, and very frequently are, acquired by prescription, when it is practically certain that there never was a deed; but this is by a fiction of law, by which, after long user, a grant by deed is presumed to have been made in ancient times, and that the deed has been long since lost or destroyed; and this presumption is, except under adverse circumstances, permitted by the policy of the law, to quiet titles to rights which have for many years been enjoyed without dispute, but for which no legal origin, except long user, can be shown. If, however, a usage in the nature of an easement has been enjoyed for a limited time, less than the law requires for prescription, with the knowledge and assent of a landowner, but without any grant by deed, it is obvious that it would be wrong for that usage to be treated as illegal, and the person exercising it as a trespasser liable for damages. The law in such and similar cases would imply that a licence or permission was granted, which, though not sufficient to create a permanent right, would be a sufficient excuse for the trespass, as it otherwise would have been. Without such knowledge and assent, doubtless the usage would constitute a trespass, for which the trespasser could be sued. In most cases a licence is revocable, and in this exists the principal distinction between a licence and an easement; but there are cases in which even a licence may become irrevocable, and thus practically an easement is acquired without deed, on the ground that revocation would, under the circumstances, be inequitable and unjust.

Customary rights also require some notice here, as, though the law of customs (see CUSTOM) bears upon many subjects besides easements, easements and rights similar to easements may be claimed by custom. Such claims are an exception to the rule, that a deed is necessary for the creation of an incorporeal hereditament. An easement is commonly a right belonging to an individual, but it may also belong to a number of individuals belonging to a class, as the inhabitants of a parish or village. They may have a right, for instance, to dip for water at a spring, or to walk along a private road to their houses, and these rights, not belonging to the public at large, but being enjoyable in respect of their houses only, are easements, and may be enjoyable by custom. An instance of this occurs in *Carlyon v. Lovering* (1837, 1 H. & N. 784), where a customary right is alleged that tanners and miners within the Stannaries of Cornwall, working mines in the Stannaries near streams, should have the privilege of washing the tin in the streams, and throwing the rubbish into the stream. This right was claimed by custom, and, being claimed in respect of the mines, had every feature of an easement. Claims to easements by custom are expressly recognised in the Prescription Act (2 & 3 Will. IV. c. 71).

Easements are of two kinds, viz.: easements, commonly so called, and "Natural Rights." The main distinction between them is in their origin. It has been stated above that, as a general rule, all incorporeal hereditaments have their origin in a grant, which grant is, however, in many cases

only presumed or implied. Natural rights, however, stand on a different footing. They are given by law to every owner of land, irrespectively of any grant by the servient owner, as without them no man would be sure that his land would not, at any time, be rendered useless by his neighbour's otherwise lawful act. They are given for mutual security, and therefore from motives of public policy. They are inherent in land of natural right, and are secured by the common law. These rights have reference to support for land from adjacent and subjacent soil while in its natural state, that is, unbuilt upon and unexcavated, and the due enjoyment of air, light, and water by every landowner, which, by provision of nature, pass from the land of one person to that of another.

Easements, in the limited sense of the word,—that is, excluding natural rights, which are a legal incident to the ownership of land while in its natural condition,—can, except in the case of wills and customs, only be acquired by grant from the servient to the dominant owner. In *Rangleley v. The Midland Rwy. Co.* (1868, L. R. 3 Ch. 313), which was a case relating to a right-of-way, Lord Cairns, L.J., said, "I will assume, in the first place, that that is a correct expression, and that the object is to create what is properly termed an easement over land; but, assuming that to be so, it appears clear that to create an easement over land you must possess the ownership of the land. Every easement has its origin in a grant, express or implied. The person who can make that grant must be the owner of the land. A railway company cannot grant an easement over the land of another person," the company having, on stopping up a public way, assumed the right to create a new public way in lieu thereof, under their supposed parliamentary powers, over land they had not purchased. It is true that in the majority of cases no deed or grant can be produced to prove title to an easement, and that the only title is long user, that is, prescription (see PRESCRIPTION); but prescription is a legal fiction by which the law, to supply a legal origin for a right that has been exercised for a number of years, requires a deed to be presumed to have been executed, whereby a grant of the right was lawfully made in ancient times, which, in the course of years, has been lost or destroyed, and thus prescription is no exception to the rule which requires a deed for the acquisition of an incorporeal hereditament. As, however, prescription was often defeated by technicalities in evidence, an Act of Parliament was passed, commonly called the Prescription Act, to make evidence of user under certain conditions for twenty, thirty, or forty years, according to the case, sufficient to raise the necessary presumption of an ancient lost grant; and so the law is now satisfied by shorter user, but still the presumption of a grant subsists. Notwithstanding this Act, cases occur in which user of an easement may have continued for twenty years or more, but the necessary conditions to satisfy the law of prescription may not exist, or may not be capable of proof. In such cases the law provides another fiction, allowing presumption of a modern grant which has been lost. This fiction has not escaped judicial objection, and reasonably so. For if a right be so claimed, a question arises as to the nature of the presumption, that is, whether it is a conclusive presumption of law that a lost deed is to be presumed, or whether it is only a presumption of fact for the consideration of the jury or Court, and in the latter case whether any discretion is allowable as to the presumption or otherwise. In the case of *The Duke of Norfolk v. Arbutnot* (1880, L. R. 5 C. P. D. 393), Bramwell, L.J., said, "I decline also, to find that there even was a grant which has since been lost, for I am sure there never was," and Brett, L.J., in the same case, after referring to

*Angus v. Dalton*, 1881, 6 App. Cas. 740, which was then before the House of Lords, expressed a similar view. And in another case, *Earl de la Warr v. Miles*, 1881, L. R. 17 Ch. D. p. 590, the same learned judge said, "For my part, I have always been of opinion, and, until corrected, I must hold to that opinion, that if a judge is asked to find the fact of a grant, and to say it has been lost, he must have grounds for believing that it was so. I decline to find it here."

It would require too much space in a work of this character to discuss in detail the extent of, and legitimate mode of, using easements, having regard to the rights of other people with which they are often antagonistic, and also illegal obstruction of, and interference with, easements and the remedies afforded by law for these wrongs, as well as the cases in which the Courts will grant injunctions, and when they will award damages only. The reader, for such information, is referred to the usual text-books, but some notice of the termination of easements is required. In the first place, it is to be remarked that natural rights, which are not dependent upon a grant, but are, by law, an incident to the property in land, can never be totally extinguished, but that they may be temporarily suspended—thus, for instance, an easement antagonistic to a natural right may be acquired, which will operate as a suspension of the natural right while the easement lasts, but, if it ceases to exist, the natural right will at once revive. An easement, on the other hand, can be either totally extinguished or temporarily suspended, and, if once extinguished, it is gone for ever, though a similar easement can, of course, be created by a fresh grant. Easements can be terminated in various ways, either by operation of law or by the act of the dominant owner. There are many ways by which an easement may be put an end to by operation of the law, as on the completion of the purpose or term of years for which it was granted, and a familiar instance of this arises in the case of easements of necessity, which terminate by operation of law if the necessity comes to an end. Another instance of termination by operation of law arises if the dominant owner so alters his tenement, in respect of which he is entitled to the easement, that the burden on the servient tenement becomes, or would become, seriously increased, or if the easement would assume a new character. Thus, where a way was granted to a loft, and a space underneath, "now used as a woodhouse," and the loft and woodhouse were removed and a cottage built on the site, it was held that the easement was lost (*Allen v. Gomme*, 1840, 11 Ad. & E. 758). So where a right-of-way was gained by prescription, Willes, J., said, "I quite agree, also, with the argument that the right-of-way can only be used for the field in its ordinary use as a field. The right could not be used for a manufactory built upon the field. The use must be the reasonable use for the purposes of the land in the condition in which it was while the user took place" (*Williams v. James*, 1867, L. R. 2 C. P. p. 582). Unity of seisin of the dominant and servient tenements in the same person will also effect the extinction of an easement by operation of law. The reason for this is obvious. It has been shown that an easement is a right the owner of land has to exercise some privilege on the land of another person, or to restrain him from doing something on his own land for the benefit of the dominant tenement. If the dominant and servient tenements, however, have become the property in fee of the same persons, the owner can do what he pleases, and exercise the former easement, not as an easement, but simply because the land over which it was exercised is his own. It is to be borne in mind, however, that the unity must be a unity of seisin in fee, or it may only

produce a suspension of the easement while the union lasts, and not a total extinction.

Extinction may also be brought about directly by the act of the dominant owner, that is, by release or by abandonment from which a release is to be implied. As easements must be created by grant, so by a regrant or release they can be reconveyed to the servient owner and abolished. Actual regrants or releases are not often met with, but it is not uncommon to meet with circumstances from which a release can be implied. As a grant is to be implied from suffering user of a privilege for a number of years, so a release may be presumed from a lengthened period of non-user. Non-user, however, has to be taken into consideration with all the surrounding circumstances to have this effect, and the surrounding circumstances may be used to explain away the implication of abandonment. If a building with ancient lights be pulled down, this does not necessarily operate as abandonment of the easement, for it may be the evident intention of the owner to erect a new building with similar lights on the same site; but where such a building was pulled down and another erected without windows, which remained for seventeen years, it was held that the right was lost by abandonment (*Moore v. Rawson*, 1824, 3 Barn. & Cress. 332).

As a grant cannot be presumed unless the user of the easement has continued for twenty years, it has been thought that a release cannot be presumed unless non-user has continued for a like period; but this is not so, and it was held that cesser of user, coupled with any act clearly indicative of an intention to abandon, would have the effect of raising an implication of a release quite irrespectively of time, and that it is not so much the duration of the non-user as the nature of the act done that determines the question. The period of time is only material as one element in the evidence (*R. v. Chorley*, 1849, 12 Q. B. p. 519).

Lastly, it may be stated as a general rule that any right, whether a natural right or an easement, if only suspended, will revive when the cause of the suspension is removed, but that, if an easement is extinguished entirely, it will not in any case revive, though a similar right may be granted or acquired by prescription under the Prescription Act, or under the doctrine of lost grant.

[See Gale on *Easements*, 7th ed.; Goddard on *Easements*, 4th ed.; Innes on *Easements*, 1893.]

**East India Company.**—See BRITISH INDIA; COMPANIES, CHARTERED; and 60 Vict. c. 10.

**East India Stock.**—This was an authorised trust investment under Lord St. Leonard's Act. It included stock charged on the revenues of India, and created under or by virtue of any Act of Parliament passed on or after August 13, 1859 (30 & 31 Vict. c. 132, s. 1), and also the capital stocks created under the subsequent East India Loan Acts (32 & 33 Vict. c. 106, s. 16 to 48 & 49 Vict. c. 28, s. 14; see Lewin on *Trusts*, 9th ed., p. 331). The old East India Stocks have (substantially) been all converted into India Stock (India Stock Act, 1887, 50 & 51 Vict. c. 11; no East India Stock is quoted in the *Stock Exchange Annual*).

India 3½ per cents. and 3 per cents. are authorised investments under the Trustee Act, 1893, as is also any other capital stock which may at any



time thereafter be issued by the Secretary of State for India under the authority of Act of Parliament, and charged on the revenues of India (s. 1). This does not include guaranteed Indian Railway Stock (*Green v. Angell*, 1867, W. N. 305).

**Easter**—The Festival of the Resurrection of our Lord, which has been observed since apostolic times. The rule of the English, as of the whole Western, Church, is that the festival shall be kept on the first Sunday after the full moon which happens upon or next after the 21st of March, and if the full moon happens on a Sunday, Easter Day is the Sunday after. On the adoption of the Gregorian calendar in 1752, the system of calculating the full moon was altered (see 24 Geo. II. c. 23). Easter Day is appointed in the Book of Common Prayer to be observed by proper Psalms, Lessons, Collect, Epistle, Gospel, and Preface, and the recitation of the Athanasian Creed; and it is also one of the three occasions in the year on which every parishioner is directed to receive the Holy Communion. The Monday and Tuesday following are also directed to be observed as holy days. By the Bank Holidays Act, 1871 (34 & 35 Vict. c. 17), Easter Monday is one of the days directed to be kept as close holidays, and no person is compellable to make any payment or do any act on it which he would not be compellable to make or do on Christmas Day or Good Friday (*q.v.*). See also BUSINESS DAY. Customary sums are payable at Easter to the incumbent (or perpetual curate, see 6 & 7 Vict. c. 37, s. 15) by every parishioner, and have been declared to be due of common right, at the rate of 2d. a head for every member of the family aged sixteen and upwards, unless it had been customary to pay more (*Laurence v. Jones*, 1724, 2 P. Wms. 662; *Carthew v. Edwards*, 1749, *ibid.* 826). Their payment is also directed by a rubric at the end of the communion office, and by 2 & 3 Edw. VI. c. 13, s. 10 (1549), Easter being one of the four customary offering days; but this last enactment has been repealed by 50 & 51 Vict. c. 59 (1887), except as to offerings and dues which have not been commuted or are still payable. Such commutation is permitted by 2 & 3 Vict. c. 62, s. 9 (1839), and in the absence of a parochial agreement the provisions of the Tithe Commutation Act (6 & 7 Will. IV. c. 71 (1837)) do not apply to Easter offerings (see sec. 90). See also TITHES. Canon 90 of 1603 appoints Easter week for the election of churchwardens (*q.v.*) or questmen, and sidesmen or assistants.

**Eavesdropping**.—A form of public nuisance said to have been punishable at common law, and thus defined. "Eavesdroppers be such as listen (? by night), under walls or windows or the eaves of a house, to hearken after discourse, and therefore to frame slanderous and mischievous tales." They are to some extent mixed up with NIGHT-WALKERS (4 Black. Com. 168; Burn, *Justice*, 30th ed., *tit.* Eavesdropping; Dalton, *Country Justice*, c. 66). The offence was presentable but not triable at a Court Leet, and indictable at the sheriff's tourn (courts both now abolished) or at Quarter Sessions, and punishable by fine, and finding sureties for good behaviour. Hawk. (*Pl. C.*, bk. i. c. 61, s. 4) suggests that a justice could bind an eavesdropper over to good behaviour. There is no modern instance of a prosecution or precedent of an indictment for this offence, but see 9 Seld. Soc. Pub. 70, for a presentment in 1390 in the Court Leet of Norwich of a chaplain for eavesdropping by night.

# **Ecclesiastical Commissioners.**

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The important powers originally conferred on the Church Building Commissioners have since 1857 been vested in the Ecclesiastical Commissioners, and as the Acts relating to the Church Building Commissioners commence in 1818, and therefore before the establishment of the Ecclesiastical Commissioners [in 1836], it is considered convenient to take first the Acts relating to church building, and also to notice the difficulties incident to conveyances of land for ecclesiastical charitable purposes, which, so far as regards sites for churches, are removed by the statutes.

*Church Building Acts.*—These Acts, and the law as to church building and division of parishes, are fully discussed in Phillimore's *Ecclesiastical Law*, 2nd ed., by Sir Walter Phillimore, of which, by his permission, use is made in this article (see Phillimore, *Ecccl. Law*, vol. ii., under the general head of Church Extension, and particularly chaps. 4 and 5 (pp. 1703 to 1738), on the Building of Churches and Division of Parishes, and chaps. 3 and 4 (pp. 1658 to 1702), on the Ecclesiastical Commissioners and (1672) Augmentations of Benefices).

In considering the statutes it is necessary to bear in mind the legal difficulties that they are framed to meet, including those which apply to conveyances of land for charitable purposes.

(1) It is an established principle of ecclesiastical law that the cure of souls in a parish is vested in the incumbent, and that, as stated by Coleridge, C.J., in *Wood v. Burial Board of Headingly*, [1892] 1 Q. B. 729, "No clergyman can perform sacred rites in the parish of another clergyman without the consent of the incumbent—to do so would be an ecclesiastical offence" (see Phillimore, *Ecccl. Law*, 906).

(2) Apart from statutory provisions, the grant *inter vivos*, or gift by will of a site for a church, or of money to purchase a site and build a church on any land not already in mortmain (distinguished in the cases from a gift to build a church when a site is obtained) would, before the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), have been void under 9 Geo. II. c. 36, and between that Act of 1888 and the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), would have been void, unless in accordance with the provisions of the Act of 1888. The said Act of 1891 restricted the meaning of land as used in 9 Geo. II. c. 36, excluded from the prohibitory clauses many interests in land, and sanctioned its being left to a charity, but provided that in such case it must be sold, so that though the present general law is more liberal to charities than before, it does not, apart from the Church Building Acts, facilitate the acquiring of sites for churches.

(3) The vesting a site in any corporation not empowered by law to hold land would, without licence from the Crown under the old Mortmain Laws, have rendered it liable to forfeiture to the Crown, a liability which is expressly preserved by the Mortmain and Charitable Uses Act, 1888.

(4) Though it is frequently convenient and desired to vest the site for a new church or any building for church or parish purposes in the vicar

or rector in his corporate capacity, yet, even if licence from the Crown were obtained, it is very doubtful if this could legally be done apart from the Church Building Acts. On this difficulty, as applying to mission buildings that do not come within the Church Building Acts, Messrs. Crawley, Arnold & Co., solicitors to the Church Building Corporation, in 1892 took the opinion of Sir R. Webster, Mr. Dibdin, Mr. Wolstenholme, and Mr. (now Sir) Howard Elphinstone, and those eminent counsel were equally divided on this question, whether, even if licence to hold in mortmain were obtained, a conveyance could legally be made to a rector or vicar or other corporation sole in his corporate character. The usual plan in the case is to take a conveyance for ecclesiastical charities, not coming within the Church Building Acts, or any special statutes, to trustees by deed enrolled, subject to the objection that if the conveyance be by gift and not for value, it is liable to be defeated by the death of the grantor within twelve months.

It is convenient to notice here that an ecclesiastical charity, as defined by sec. 75 of the Parish Councils Act (56 & 57 Vict. c. 73), is excluded from the powers of the Parish Council.

Before considering what are usually known as the Church Building Acts, there are some important statutes to be mentioned.

The 43 Geo. III. c. 108 (as to which, see article CHARITIES, vol. ii. p. 461) to a limited extent removed difficulty No. (2), *supra* (see on this Act, Phillimore, *Ecc. Law*, 2nd ed., p. 1678; *Fisher v. Brierley*, 1860, 29 L. J. Ch. 477; Theobald on *Wills*, 1895, 2nd ed., pp. 322, 323, and cases there cited; *In re Smith's Estate*, *Clements v. Ward*, 1887, 35 Ch. D. 589; *O'Brien v. Tyssen*, 1884, 28 Ch. D. 372; *Dixon v. Butler*, 1839, 3 Y. & C. Ex. 677; *Girdlestone v. Creed*, 1853, 10 Hare, 480; *Incorporated Church Building Society v. Coles*, 1855, 1 Kay & J. 145; 5 De G., M. & G. 324; *In re Vaughan*, *Vaughan v. Thomas*, 1886, 33 Ch. D. 187; *In re Hendry*, *Watson v. Blakeney*, 1887, 56 L. T. 908; *Sinnett v. Herbert*, 1872, L. R. 7 Ch. 232; *Champney v. Davy*, 1879, 11 Ch. D. 949). Under this Act the concurrence of the Ordinary was necessary for carrying out directions of the testator, or in other cases of the patron and incumbent also.

By 51 Geo. III. c. 115, further power was given to owners of manors to grant five acres of land for like purposes free from rights of common (see on this Act, *Forbes v. Ecclesiastical Commissioners*, 1872 L. R. 15 Eq. 51; Phillimore, *Ecc. Law*, 1679; see also *Champney v. Davy*, 1879, 11 Ch. D. 952).

The Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50) (Phillimore, *Ecc. Law*, 1698), empowered absolute or limited owners and persons under disability to grant an acre for a site for any church, chapel, or place of divine worship. The Act was extended by 45 & 46 Vict. c. 21, s. 1, giving like powers to ecclesiastical and lay corporations (see Phillimore, *Ecc. Law*, pp. 1701, 1702). These two Acts did not require the concurrence of the Ordinary, nor did they make the grant void if the grantor died within a specified time after the grant; but they contain no provisions for grant to any corporation, except to the Ecclesiastical Commissioners, and provide for determining the estate granted if the land should at any time be used for any purpose other than that of a site for a place of worship.

*School Sites Acts.*—The series of statutes commonly known as The School Sites Acts (see in particular The School Sites Act, 1841, 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37, 1844; 12 & 13 Vict. c. 49, 1849; 13 & 14 Vict. c. 28, 1850; 14 & 15 Vict. c. 29, 1851; 15 & 16 Vict. c. 49, 1852) contain provisions enabling tenants for life and persons under disability to convey

and permit conveyances to corporations, sole or aggregate (see 4 & 5 Vict. c. 38, s. 7; see for a case of a conveyance to an incumbent and an archdeacon *Hornsey District Council v. Smith*, [1896] 2 Ch. 254), and to the minister and churchwardens, and provide in effect that they shall be a corporation so far as regards succession for the purpose; but these Acts contain provisions for determining the estate in case the property is used for other purposes than those specified in the Acts, and require enrolment of deeds. See also the list of exempt charities given in vol. ii. pp. 461-462.

*Under the Companies Acts.*—Several diocesan societies have been formed and incorporated under the Companies Acts, 1862 and 1867, for ecclesiastical purposes in the diocese, with the omission of the word "limited" from the name, by licence of the Board of Trade under sec. 23 of the Companies Act, 1867. The Companies Act, 1867, empowers companies formed under it to hold land without licence in mortmain; but as these societies are not "for gain," they come within sec. 21 of the Act of 1862, and cannot hold more than two acres without the licence of the Board of Trade.

*Charitable Trustees Incorporation Act, 1872 (35 & 36 Vict. c. 24).*—This empowers the incorporation by certificate of the Charity Commissioners of trustees for religious or charitable purposes, but it is believed that in practice little use is made of the Act.

A note on church building would be incomplete without reference to the Incorporated Society for Promoting the Enlargement, Building, and Repairing of Churches and Chapels, which has its offices in Dean's Yard, Westminster. It was incorporated by 9 Geo. IV. c. 42. As appears from the case of the *Incorporated Church Building Society v. Barrow*, 1853, 3 De G., M. & G. p. 120 (see also *Incorporated Church Building Society v. Coles*, 1855, 1 Kay & J. 145; 5 De G., M. & G. 324), the society has no power to purchase land, but only to build churches or chapels on land already purchased, and therefore could take a bequest by will of pure personalty without being obnoxious to 9 Geo. II. c. 36 (see Phill. *Ecclesiastical Law*, p. 1741). The society can only employ its general funds on consecrated buildings, but it acts as a trustee and accepts gifts of special trusts for any parish buildings, and holds, according to the report of 1896, on trust for repair of churches, £97,566, 18s. 8d. These trust funds for repairs of churches are of great value since the Compulsory Church Rates Abolition Act of 1868 (31 & 32 Vict. c. 109).

*The Church Building Acts proper.*—The set of statutes usually known as the Church Building Acts commence with the Act 58 Geo. III. c. 45, 1818, by which Church Building Commissioners were appointed to examine into parishes and expend in building churches a sum of £1,000,000 granted by Parliament. This Act was amended and extended by 59 Geo. III. c. 134, by which the Commissioners were incorporated, and by 3 Geo. IV. c. 72, and by 5 Geo. IV. c. 103 (1824), a further sum of £500,000 was granted for the purpose. These sums have long since been expended. The Acts also provided for the division of parishes and for endowment by means of pew rents.

The statutes were amended and extended by a great number of statutes. The following is a list given in New Parishes Acts and Church Building Amendment Act of 1884, as what together with that Act may be cited as the Church Building Acts:—

58 Geo. III. c. 45, 1818; 59 Geo. III. c. 134, 1819; 3 Geo. IV. c. 72, 1822; 5 Geo. IV. c. 103, 1824; 7 & 8 Geo. IV. c. 72, 1827; 1 & 2 Will. IV. c. 38, 1831; 2 & 3 Will. IV. c. 61, 1832; 1 & 2 Vict. c. 107, 1838; 2 & 3 Vict. c. 49, 1839; 3 & 4 Vict. c. 60, 1840; 7 & 8 Vict. c. 56, 1844; 8 & 9 Vict. c. 70, 1845; 9 & 10 Vict. c. 68, 1846; 11 & 12 Vict. c. 37, 1848; 14 & 15 Vict. c. 97, 1851; 17 & 18 Vict. c. 32, 1854; 19 & 20 Vict. c. 55, 1856; 32

& 33 Vict. c. 94, 1869; of which 58 Geo. III. c. 45, and 59 Geo. III. c. 134, may be treated as the principal Acts, and the others as amending Acts.

To this list may be added the following, as material to the powers of the Ecclesiastical Commissioners—

*Principal Acts.*

1 & 2 Will. IV. c. 38, Private Patronage Act.

6 & 7 Vict. c. 37, New Parishes or Peel Acts.

19 & 20 Vict. c. 55, substitutes the Ecclesiastical Commissioners for the Church Building Commissioners from 1st January 1857.

19 & 20 Vict. c. 104, amending the New Parishes Acts and containing provisions applicable to districts formed under all the Acts.

*Amending Acts.*

{ 1 & 2 Vict. c. 107.  
3 & 4 Vict. c. 60.  
7 & 8 Vict. c. 58.  
11 & 12 Vict. c. 37.  
14 & 15 Vict. c. 97.

{ 7 & 8 Vict. c. 94.  
19 & 20 Vict. c. 104.

The Church Building Acts proper contain many provisions enabling the Church Building Commissioners to accept buildings or sites for churches (see 58 Geo. III. c. 45, s. 33), for corporations and limited owners to convey sites for the purpose (s. 34), powers to compel the procuring of sites by parishes (s. 35), empowering limited owners to sell sites (ss. 36, 38, 39), and powers for compulsory purchase, somewhat analogous to those in the Lands Clauses Acts (see ss. 41 to 51).

These powers were extended by other Acts, particularly 3 Geo. IV. c. 72, ss. 1-4, 8, 29, and 32, and as to the vesting the sites in the persons or corporations specified (5 Geo. IV. c. 103, s. 14); see also vesting the freehold in the incumbent (8 & 9 Vict. c. 70, s. 12, and 19 & 20 Vict. c. 104, s. 10), and as to selling the sites of churches pulled down (18 & 19 Vict. c. 127, s. 14). There were provisions also for the repair of churches; many of which, as depending on church rates, are now obsolete; but there are special provisions for repair funds, where private individuals were empowered to build churches or chapels (see 1 & 2 Will. IV. c. 38, s. 2; 14 & 15 Vict. c. 97, s. 7, which Act also exempted from the Mortmain Acts all endowments for repair funds (see s. 8)).

*Private Patronage Acts.*—In 1824 a new principle was introduced by 5 Geo. IV. c. 103, enabling private persons, with the approval of the bishop, to build churches or chapels, and for vesting (see s. 14) the freehold of the site in the persons named in the sentence of consecration, and (s. 15) for the trustees to sell vaults and burying-places, and provide for maintenance by pew rents, and for the Church Building Commissioners to make any church so built into a district church or chapel under their Acts, and sec. 18 applied many of their powers. These were amended by 7 & 8 Geo. IV. c. 72, s. 3, providing that the Commissioners might direct how any endowment provided should be settled and assured. It contained also a provision as to the right of patronage, which has been repealed and altered by the Act next cited.

These Acts were amended by 1 & 2 Will. IV. c. 38, containing express provisions as to the patronage where an endowment of £1000 (37 & 38 Vict. c. 96) was provided; and by sec. 7 notice was to be given to the patron or incumbent, and if the patron chose to build and endow, he was to be preferred. Further provisions on this subject are contained in 3 & 4 Vict. c. 60; 14 & 15 Vict. c. 97.

*New Parishes Acts and Ecclesiastical Commissioners' Powers.*—Meantime

the Ecclesiastical Commissioners had been established by 6 & 7 Will. iv. c. 7, 1836. Their constitution was modified by 3 & 4 Vict. c. 113. The special function of the Ecclesiastical Commissioners was to administer episcopal and capitular revenues, and make better provision for cure of souls in parishes where such assistance was required (see Phillimore, *Eccles. Law*, p. 1867); but by the New Parishes Acts, 1843 and 1844, powers were granted to the Ecclesiastical Commissioners which were cognate to those vested in the Church Building Commissioners. Thus by the New Parishes Act of 1843, 6 & 7 Vict. c. 37, ss. 9 and 22, also commonly known as Peel's Act, amended and extended by 7 & 8 Vict. c. 94, the Ecclesiastical Commissioners were empowered to borrow £600,000 from Queen Anne's Bounty, and to take gifts of land or money by deed or will for providing for the endowment of any minister of any district created under the Acts or providing a church or chapel. See as to this Act, *Baldwin v. Baldwin*, 1856, 22 Beav. 419. These Acts were explained and extended by 19 & 20 Vict. c. 104, commonly called Lord Blandford's Act (see BLANDFORD (LORD'S) ACT), and 47 & 48 Vict. c. 65, 1884.

Sec. 29 of 3 Geo. iv. c. 72 provided that after five years from the date of the conveyance of the site of a church, the property should be free from all claims; but it has been held that this clause must be strictly construed. In *A.-G. v. Bishop of Manchester*, 1867, L. R. 3 Eq. 437, it was held that it did not apply or make valid the conveyance by a trustee of a chapel already erected subject to special trusts, and the conveyance was set aside, although it had been made more than five years before the action, and the chapel had been actually consecrated as a parish church.

It will be seen that until 1857 the Church Building Commissioners under the "Church Building Acts" and Ecclesiastical Commissioners under what are called the "New Parishes Acts, 1843 and 1844," had distinct powers applying to the building of churches and the division of parishes; and there were also in existence, under the Private Patronage Acts, the separate statutory powers enabling private persons to build churches and chapels, and the Church Building Commissioners to assign districts to them.

In 1856 these statutory powers were, to some extent, brought together by the Act 19 & 20 Vict. c. 55, by which Act the powers of the Church Building Commissioners were, as from January 1857, vested in the Ecclesiastical Commissioners. Lord Blandford's Act was passed in the same year. These Acts were in 1869 amended by 32 & 33 Vict. c. 94, containing among other enactments provisions to facilitate the surrender to the Ecclesiastical Commissioners of separate trusts of vaults or pew rents created under the Private Patronage Acts.

The last Act to be noticed is 47 & 48 Vict. c. 65 (Aug. 14, 1884), amending the New Parishes Acts (or Peel Acts), 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; and 19 & 20 Vict. c. 104, empowering the Ecclesiastical Commissioners, with the consent of the bishop, to submit to Her Majesty in Council any scheme for dissolving a district formed under those Acts, for extending the powers for alteration of boundaries, and also amending the Church Building Acts, by providing that where under sec. 18 of the Act 1 & 2 Vict. c. 107 provision has been made for maintenance of the clergyman out of pew rents, the Ecclesiastical Commissioners, with the consent of the bishop, patron, and incumbent, to revoke and alter the provision. This Act specifies what may be cited as Church Building Acts. See *ante*, p. 379.

In addition to the provisions (1) for (a) separate districts for "spiritual" purposes, and (b) new parishes under the New Parishes Acts; (2) for par-

ticular districts under the Private Patronage Acts, the old Church Building Acts provide for the creation of five different divisions or districts:—District chapelries, consolidated chapelries, distinct parishes, district parishes, and chapels without districts.

It does not appear that the statutory provisions for making any of these divisions are repealed, but according to modern practice the only districts that are now formed are the following:—Under the Church Building Acts—(1) district chapelries; (2) consolidated chapelries. Under the Private Patronage Acts—(3) particular districts. Under the New Parishes Act—(4) constitution of separate districts for spiritual purposes; (5) new parishes.

(1) *District Chapelries.*

(2) *Consolidated Chapelries.*

These are formed under the Church Building Acts.

The Ecclesiastical Commissioners may recommend to Her Majesty in Council the formation of a separate district containing within its limits a consecrated church, to which church in fact the district is assigned. But such a recommendation must always have the concurrence of the bishop; and if the district is to come out of more than one cure it must also have the concurrence of the patrons of the cures affected. If the district is taken out of one cure only, it is termed a "District Chapelry," if out of more than one a "Consolidated Chapelry."

*District Chapelry.*—The constitution of the district chapelry is effected by an Order of the Queen in Council, by which it is recited that the Ecclesiastical Commissioners have, in pursuance of the Act 59 Geo. III. c. 134; 2 & 3 Vict. c. 49; 19 & 20 Vict. c. 35, laid before Her Majesty a representation that a district chapelry should be assigned to a church named with the consent of the bishop, and a further representation that it was expedient that banns of matrimony should be published, and marriages, baptisms, churchings, and burials should be solemnised in the church, and that the fees should belong to the minister thereof, with a proviso, if so arranged, that during the existing incumbency of the mother parish the fees shall be paid over to the incumbent of the mother church.

*Consolidated Chapelry.*—The constitution of a consolidated chapelry is also effected by an Order of the Queen in Council reciting that the Ecclesiastical Commissioners, in pursuance of 8 & 9 Vict. c. 70; 14 & 15 Vict. c. 97; 19 & 20 Vict. c. 55; and 34 & 35 Vict. c. 82, have laid before Her Majesty a representation that it is expedient that certain contiguous portions of (two or more parishes) should be formed into a consolidated chapelry for all ecclesiastical purposes and assigned to the consecrated church of (naming it), with the consent of the bishop and patrons. This only recites the representation was that the places named should be formed into a consolidated chapelry for all "ecclesiastical purposes," and should be assigned to the church named. There is nothing in the Order as to celebration of marriages, etc., or fees, as sec. 10 of the Act 8 & 9 Vict. c. 70 provides that banns of marriage may be published, and marriages, baptisms, churchings, and burials performed in the church of any consolidated chapelry, but that the fees, unless voluntarily relinquished, are to go to the incumbents of each of the parishes out of which it is formed during the respective incumbencies, and the clerk's fees to the clerk of each parish during continuance of his office, and after the next avoidance of such respective incumbencies, and the situation of such respective clerks shall have become vacant, such fees shall belong and be paid to the incumbent of such consolidated chapelry and the clerk of the church thereof.

It is presumed that until the incumbent of either a district chapelry or a consolidated chapelry became entitled to the fees, the cure would not become a new parish under 19 & 20 Vict. c. 104, s. 14.

In both cases of a district chapelry and a consolidated chapelry, the amount of preliminary endowment required rests in the discretion of the Commissioners, who are guided in this respect by the views of the bishop, and by the circumstances of the particular case.

The patronage of the church can be settled, before its consecration, by a deed of agreement under the Acts of 8 & 9 Vict. c. 70, s. 23, and 11 & 12 Vict. c. 37, s. 4, to which deed the bishop and the patron and the incumbent of the parish within which the new church stands are parties, or, after consecration, by an instrument of surrender under the Acts 3 Geo. IV, c. 72, s. 15, and 1 & 2 Vict. c. 107, s. 15. The Commissioners are not parties to the first deed; but the draft should be forwarded to their office for perusal before the engrossment is made. The other instrument, to which they would be parties, is prepared by them.

The terms of these sections have been treated in practice as authorising an agreement by the incumbent, that the district shall be constituted and the patronage go in accordance with the agreement on the determination of the incumbency. This was done in the case of St. John's, Bovey Tracey, which was constituted a district chapelry in 1896, the agreement as to patronage having been made in the life of the former incumbent.

(3) *Particular Districts under the Private Patronage Acts* (1 & 2 Will. IV. c. 38; 3 & 4 Vict. c. 60; 14 & 15 Vict. c. 97)—*Declaration of Patronage*.—The patronage of a church, and of any district to be assigned to it, may be vested by the Commissioners before consecration in the persons, or in the nominees of the persons, who have built and endowed the church to the satisfaction of the Commissioners, and have in the like manner provided a repair fund for it. No other concurrence than that of the bishop is needed, but the patron and the incumbent of the mother cure are entitled to three months' notice beforehand from the Commissioners; and their objections have to be considered. Moreover, the patron is entitled to oust the promoters by undertaking to do what they propose doing. Recourse is generally had to these Acts in cases where there is opposition to the proposed arrangements on the part of the patron or incumbent of the mother cure, and where the endowment required by the New Parishes Acts is not forthcoming. A district formed under these Acts is termed a "Particular District."

The document assigning to a church a particular district is not as in the other cases ratification by an Order of the Queen in Council of a scheme or representation of Ecclesiastical Commissioners, but an instrument under the seal of the Ecclesiastical Commissioners and the bishop, by which the Commissioners, in exercise of the powers given by the Church Building Acts, particularly 1 & 2 Will. IV. c. 38; 14 & 15 Vict. c. 97; 19 & 20 Vict. c. 55, with the consent of the bishop, assign to the church a particular district described in the schedule, and with the like consent in execution of the powers in the Church Building Acts, particularly 1 & 2 Will. IV. c. 38; 3 & 4 Vict. c. 60; 7 & 8 Vict. c. 56 (such two lastly mentioned Acts being two of the Church Building Acts), and in the said Act of 14 & 15 Vict. c. 97; 19 & 20 Vict. c. 55, declare that banns of matrimony shall be published, and that marriages, baptisms, churchings, and burials shall be solemnised or performed, etc., and that the fees shall, after the next avoidance of the incumbency of the mother parish, belong to the incumbent of the particular district. The particular district becomes a distinct parish when the fees



are payable to the incumbent in accordance with sec. 14 of 19 & 20 Vict. c. 104; as to which, see *infra*.

(4) *Separate Districts for Spiritual Purposes.*

(5) *New Parishes.*

*Under the New Parishes Acts (6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94—Formation.*—The Commissioners, with no other concurrence than that of the bishop of the diocese, may recommend to Her Majesty in Council, that a separate district for spiritual purposes should be constituted *before* the provision of a consecrated church for such district. One month's notice, however, of the application has to be given by the Commissioners to all patrons and incumbents concerned; and their objections, if any, have to be considered. On a church being provided and consecrated, and approved by the Commissioners, the district becomes a "New Parish."

*Endowment.*—A permanent endowment of at least £150 per annum must be secured to the new district at the time of its formation, or an adequate (*i.e.* an equivalent and secured) maintenance for the minister must be available from other sources.

*Patronage.*—The patronage may be assigned by the Order of Her Majesty in Council creating the cure, to the promoters or their nominees, in consideration of their contributing, in a manner and to an extent satisfactory to the Commissioners, either towards the endowment, or towards the erection of a permanent church for the district; and, unless so assigned, shall be exercised by the Crown and bishop alternately.

The constitution of a *district for spiritual purposes* under these Acts is effected where there is no consecrated church or chapel in it, by an Order of the Queen in Council, reciting that under the powers of 6 & 7 Vict. c. 37, and, when endowment is provided wholly or in part by Commissioners out of their funds, also 3 & 4 Vict. c. 113 (see s. 67), and 23 & 24 Vict. c. 124 (see s. 12), the Ecclesiastical Commissioners have prepared a scheme for constituting a separate district for spiritual purposes, that persons have contributed and paid to the Commissioners a sum for an endowment, and the Commissioners have agreed in respect thereof to pay an annual sum, and to grant a capital sum out of their common fund, and the desire of the contributors as to patronage, the Commissioners, with the consent of the bishop, propose that a separate district shall be constituted for spiritual purposes, and that the patronage of such district and new parish shall be vested in the persons named.

Under secs. 11 and 13 of 6 & 7 Vict. c. 37, a minister may be appointed for such pastoral duties as are specified in his licence, and a temporary place of worship licensed by the bishop. As soon as a church is approved of and consecrated, the district becomes a new parish for all ecclesiastical purposes (see s. 15). Under sec. 19 the Commissioners may make grants for endowment. The Act 6 & 7 Vict. c. 37 only applied where there was no church; but under 19 & 20 Vict. c. 104, s. 1, a district may be constituted under 6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94, notwithstanding there is a church already in it. The Commissioners may specify such church as the church of the new parish.

Whenever a church is to be built under the Acts on a new site, the site should be conveyed to the Commissioners, and the church should be built according to plans approved beforehand by the Commissioners. No building, unless it be of stone or brick, and consecrated, is regarded as a church.

As to Lord Blandford's Act, 19 & 20 Vict. c. 104, see vol. ii. p. 165; and as to the determination of rights of burial or marriage in the old parish, the

cases there cited of *Hughes v. Lloyd*, 1888, 22 Q. B. D. 118, and *Fuller v. Alford*, 1882, 10 Q. B. D. 418; and see as to a claim to fees of the incumbent of the mother church during whose incumbency a district has been parted off from it, *R. v. Alston*, 1848, 12 Q. B. 971; see also *Tuckness v. Alexander*, 1863, 9 Jur. N. S. 1026; 2 Drew. & Sm. 614; and as to voting for church rates, *Gough v. Jones*, 1863, 9 Jur. N. S. 83, affirmed on appeal, 3<sup>rd</sup> Moo. P. C. N. S. 1; and as to voting for election of churchwardens of old parish, *R. v. Stevens*, 1863, 3 B. & S. 333; 32 L. J. Q. B. p. 90; S. C. *nom R. v. Archdeacon of Exeter*, 1863, 1 W. R. 262; Phill. *Ecc. Law*, pp. 1477, 1729; but see a case of a district chapelry, *Varty v. Nunn*, 1841, 5 Jur. O. S. p. 1138, not cited. This seems to have been somewhat different, as it was a case of a distinct parish formed on a division of the parish of Hackney into three distinct parishes, under sec. 16 of 58 Geo. III. c. 45; see these cases discussed in *Prideaux on Churchwardens*, ed. 1895, p. 37, by Mackarness.

In considering the statutes and cases it is necessary to bear in mind that distinctions are in some cases taken between "spiritual" purposes, "ecclesiastical" purposes, and "other" or temporal purposes.

See as to apportionment of charity funds appropriated for the repair of the church of the old parish, *In re Church Estate Charity, Wandsworth*, 1871 L. R. 6 Ch. 296, and s. 22 of 8 & 9 Vict. c. 70.

The Compulsory Church Rate Abolition Act, 31 & 32 Vict. c. 109, s. 6, contains a provision that the inhabitants of a district are alone to vote in respect of a rate for repair of the church of their district; but having regard to the provisions of that Act, church rates are of little importance. See **RATES (CHURCH)**.

#### *Ecclesiastical Leases, etc.—*

The following is the substance of instructions issued by the Ecclesiastical Commissioners in reference to sales, exchanges, or leases under the provisions of the (Ecclesiastical Leasing) Acts, viz. the 5 & 6 Vict. c. 108; 21 & 22 Vict. c. 57; and 28 & 29 Vict. c. 57, by which it is competent to an incumbent, with the consent of the patron of his living and the Commissioners, to sell, exchange, or lease the lands, houses, mines, minerals, or other property belonging to his benefice. In cases where the property proposed to be sold, other than minerals, has been acquired by the benefice through the medium of the Governors of "Queen Anne's Bounty," the Commissioners decline to take proceedings with a view to its sale under the provisions of the Ecclesiastical Leasing Acts.

Proposals should be submitted for the consideration of the Commissioners in a prescribed form, signed by or on behalf of the incumbent so soon as specific terms have been provisionally agreed upon with the intending purchaser or lessee, and accompanied by the surveyor's valuation, if a surveyor has been employed.

The whole of the proceeds derived from the sale of glebe land (except moneys which, in respect of any sale, shall become due and payable by way of perpetual annual chief or other rent or rent-charge), or from the working of minerals belonging to a benefice which have been sold or let, are required to be paid over to the Commissioners and invested by them in the public stocks or funds, until laid out in the purchase of other lands, houses, and hereditaments, inclusive of freehold ground rents, and the dividends thereof will be paid to the incumbent for the time being of the living, subject to certain provisions with respect to the appropriation to the purposes of the Commissioners' common fund of the improved value of the living arising by means of any such sale or lease; but these provisions do not affect the incumbent in possession at the time of the sale or grant of the lease, and are subject to the following enactment, viz. that the annual average income of the benefice affected shall not be left at a less sum than £600 if the population thereof amount to 2000, nor at a less sum than £500 if the population thereof amount to 1000, nor in any other case at a less sum than £300, and that in making additional provision for the cure of souls out of such proceeds the wants and circumstances of the places in which the lands, mines, minerals, quarries, or beds demised or sold are situate shall be primarily considered.

In cases where the payment by the purchaser or lessee of all the costs and charges is

not stipulated for under the terms agreed upon for the sale of glebe land or the sale or letting of minerals, the costs and charges incurred by or on behalf of the incumbent as well as those of the Commissioners' agents may be deducted from the proceeds of the sale or lease.

In the case of sales the charges which the Commissioners would be prepared to allow out of the consideration money for the remuneration of the solicitor acting on behalf of the incumbent must not exceed the undermentioned scale, which covers any charge for negotiation, viz:—

Purchase money	not exceeding	£	d.
	50		0
" exceeding £50 and	" 100	3	0
" " £100 "	" 150	4	0
" " £150 "	" 200	5	0
" " £200 "	" 300	6	0
	£	d.	£
Above £300, for the remainder of the first £1000 .	2	0	0 per 100
For the second and third £1000 .	1	0	0 " 100
For the fourth and each subsequent £1000 up to £10,000 .	0	10	0 " 100
For each subsequent £1000 up to £25,000 .	0	5	0 " 100
For each subsequent £1000 .	0	2	6 " 100

The undertaking for the payment of costs which is appended to the form of proposal is intended, in the event of the proposal being abandoned, as a security for the payment of the costs of the Commissioners' own agents, viz. those of their surveyors for advising as to the expediency of a proposal, and of their solicitors for approving the draft of the lease or conveyance; these costs are systematically kept as low as practicable, but their amount varies with the circumstances of each particular case.

No proposal will be considered by the Commissioners unless the undertaking be signed by or on behalf of the incumbent.

The notice of a sale which is required to be given to the bishop of the diocese and is now limited to one month is sent from the Commissioners' office.

These statutes do not authorise any dealing with the house of residence belonging to a living or with the appurtenances of the same.

*Powers of Ecclesiastical Commissioners.*—Some of the powers of the Ecclesiastical Commissioners have been stated in the preceding pages. But the wide variety of work done by the Ecclesiastical Commissioners can best be appreciated by reference to their annual reports. Thus taking the report of 1896 for the year ending Nov. 1895, in addition to constituting and assigning twenty-five districts under the designation of district chapelries, consolidated chapelries, particular districts, districts and new parishes, and of approving churches under the Church Building Acts and Powers, noticed *ante*, it appears that *inter alia*, under the powers conferred on the Ecclesiastical Commissioners, or the Crown in Council on their recommendations, the following things were done:—The boundaries of ten districts or new parishes were altered under the Acts 7 & 8 Vict. c. 94, 13 & 14 Vict. c. 94, 32 & 33 Vict. c. 94. In three cases new churches were substituted for old or existing parish churches under the Acts 8 & 9 Vict. c. 70, and 19 & 20 Vict. c. 55. In one case a scale of pew rents was fixed for a church. In three cases tables of fees were authorised; ninety-three conveyances of sites for churches, burial grounds, parsonage houses, and glebe respectively were accepted. A long list is given of sales of reversions and purchases of leases under 17 & 18 Vict. c. 116, and of sales effected and leases granted under the Ecclesiastical Leasing Act, 24 & 25 Vict. c. 105, and of benefices augmented under 29 & 30 Vict. c. 111; (1) sec. 5 or secs. 5 and 11, by grant of capital to meet benefactions offered in favour of benefices; (2) endowing churches in public patronage and others; and (3) in making grants for the maintenance of assistant curates; or (4), under secs. 5 and 11, of capital sums towards the cost of providing a new parsonage house.

**Ecclesiastical Corporations.**—An ecclesiastical corporation is a corporation of which both the members are spiritual persons and the objects are of a spiritual kind.

Before the dissolution of monasteries, ecclesiastical corporations were divided into ecclesiastical secular and ecclesiastical regular corporations, of which the first only now exist. They are also, like civil corporations, divided into corporations sole and corporations aggregate.

Ecclesiastical corporations sole are diocesan bishops, deans of English and Welsh cathedrals, prebendaries, archdeacons, rectors, vicars of ancient parishes, probably a vicar-choral and a priest-vicar of a cathedral of the old foundation (as to which last point see *Greaves v. Parfitt*, 1860, 7 C. B. N. S. p. 838), but this may depend upon the charter of incorporation.

A perpetual curate also under the Acts 6 & 7 Vict. c. 37, and under 19 & 20 Vict. c. 104, ss. 22, 23, is a corporation sole. Ecclesiastical corporations aggregate are at present deans and chapters, and also certain other corporations or colleges, as vicars-choral, priests-vicars, senior-vicars, curators and vicars, minor canons and ecclesiastical hospitals. The incumbent and churchwardens may also by custom in certain parishes constitute ecclesiastical corporations aggregate. See CHURCHWARDEN. When a clergyman becomes entitled to a benefice or preferment, he becomes *ipso facto* at common law either a body corporate sole or a member of a corporation aggregate, or both (as to the last, an instance is furnished in the case of a dean who, if he holds his possessions singly, is a corporation sole for such purpose; but yet with his chapter is a corporation aggregate), and the estate in the freehold of the benefice is vested in him.

In the conception of the law, however, the continuance of an ecclesiastical corporation does not depend on the continuance of its possessions, the theory being that corporations were incorporated by the bishop before lands were assigned to them out of the common possessions of the See. The original method of giving property to the Church was to give it to the saint to whom a church was dedicated, the church being mentioned for the purpose of the identification of the particular church to which the gift was made (*e.g.* "To thee, St. Andrew and thy church at Rochester"), while the bishop or priest or groups of priests who were responsible for the management of the particular church were regarded as the curators of the saint's property. At a later stage the particular church itself is regarded as the owner of the land which it acquires, and holds through and in the name of its incumbent or other possessor. From this it is only a natural step to the idea of an ecclesiastical corporation seized of the property of the church, as though the church were a minor and the corporation were its trustee.

Thus, according to Coke, a parson or vicar is seized in a fee-simple qualified (*Co. Lit.* 341, *b*), though in a certain sense the fee is in abeyance. This fee-simple estate he holds for the benefit of the church and his successor; but so far as he may do anything to their prejudice, the law treats him as only the possessor of a life estate, and so in modern time it has been held that an incumbent cannot cut timber except for repairs (*Duke of Marlborough v. St. John*, 1852, 5 De G. & Sm. 174; *Bartlett v. Phillips*, 1859, 4 De G. & J. 414). It is also considered by modern conveyancers as very doubtful if, apart from other considerations (*e.g.* of a licence in mortmain), a conveyance can be validly made to an incumbent (*e.g.* a vicar to his successors) for the purposes of an ecclesiastical charity, as he cannot in his corporate capacity take two different kinds of estates, and it is probably safer to vest land intended for such purposes in trustees; and probably all estates vested in ecclesiastical corporations which were of the nature of a

fee-simple qualified. (But as to a bishop, see *Jefferson v. Bishop of Durham* 1797, 1 Bos. & Pul. 105). Ecclesiastical corporations aggregate could at common law alienate their lands; but an ecclesiastical corporation sole could not make such alienations valid as against his successor, except with the necessary consents, viz. in the case of a bishop, of the dean and chapter; and in the case of a parson or vicar, of the patron or ordinary. The rights of ecclesiastical corporations to alienate their lands except for the purpose of leasing, which is also restricted, are now prohibited by statute (see 1 Eliz. c. 92; 13 Eliz. c. 18. See WASTE). As to the powers of leasing enjoyed by ecclesiastical corporations, see ECCLESIASTICAL COMMISSIONERS; BISHOP; DEAN AND CHAPTER; GLEBE; INCUMBENT; DILAPIDATIONS, ECCLESIASTICAL. Land cannot be assured in mortmain to an ecclesiastical corporation except with the royal licence. As to the exceptions, see article CHARITIES, vol. ii. p. 460. As to a perpetual curate, see 19 & 20 Vict. c. 104. (See further the article CORPORATION.)

[*Authorities.*—Pollock and Maitland *History of English Law*; Bracton; Coke, *Institutes*; Watson, *Clergyman's Law*; Grant on *Corporations*. Case submitted to counsel by the Church Building Society as to deeds to convey mission or parish rooms, published by the Incorporated Church Building Society, and opinions thereon.]

**Ecclesiastical Courts.**—The various Ecclesiastical Courts are treated under their respective headings. See, *e.g.*, ARCHDEACON'S COURT; ARCHES, COURT OF; CONSISTORY COURT; PROVINCIAL COURTS, etc.

**Ecclesiastical Law.**—It would be manifestly impossible within the limits of the present article to attempt more than a concise statement of the main sources of the existing Ecclesiastical Law of England. These are as follows:—

1. *The Common Law.*
2. *The Canon Law*, so far as it is not opposed to the common or statute law, or to the royal prerogative.
3. *The Statute Law* (which includes the Book of Common Prayer).

It may be pointed out that the common law includes not only the common law of the realm in secular matters (*jus commune laicum*), but also the common law of the Church (*jus commune ecclesiasticum*), in other words, the unwritten part of the ecclesiastical law. See per Whitlock, J., in *Evers v. Owen* (3 Car. 1.), Godb. 432. The preamble to 25 Hen. VIII. c. 21 states the principle on which parts of the foreign Canon Law have been received in England to be that of usage and custom (see the judges' opinion delivered by Tindal, C.J., in *R. v. Millis*, 1844, 10 Cl. & F., pp. 678 *et seq.*).

The Act 25 Hen. VIII. c. 19, commonly called the "Act of Submission," ratified the assent of the bishops and clergy in convocation to the principle that subsequent canons require the licence of the Crown to their enactment, and the royal assent to their promulgation and execution. This Act, so far as it was not merely declaratory of the common law, was in the nature of a concordat, between the spirituality and the civil power. The canons of 1603 and 1640 (*vide infra*) were framed under the royal licence, and received the royal assent in strict accordance with this Act. Sec. 7 of the same Act provides "that such canons, constitutions, ordinances, and synodals provincial, being already made, which be not

contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative-royal, shall now still be used and executed as they were afore the making of this Act." This provision, meant to be merely transitory, has, in the events which have happened, continued in its former force the whole of the pre-existing Canon Law, which is not opposed to the common or statute law or to the royal prerogative (see SUBMISSION OF THE CLERGY).

*Canons of 1603.*—This body of Constitutions and Canons Ecclesiastical was passed by the Convocation of Canterbury under licence from the Crown, Bancroft, then Bishop of London, presiding, under a commission from the Dean and Chapter of Canterbury, the guardians of the spiritualities of the Metropolitan See, vacant by the death of Archbishop Whitgift. The Synod began on March 20, 1603 (O.S.), [1604 (N.S.)]. The Canons subsequently received the royal assent under the Great Seal. They did not receive the sanction of the Convocation of York till 1606. They are one hundred and forty-one in number. They are clearly binding on the clergy and on laymen holding ecclesiastical offices. The exact measure of their authority, other than consensual, over the laity generally, is more doubtful. In *Hill v. Good* (25 Car. II), Vaugh. 302 (at p. 327), Vaughan, C.J., held, dealing with Canon 99, that "a lawful Canon is the law of the Kingdom as well as an Act of Parliament." On the other hand, the now commonly received view of the Canons of 1603 is that they do not *proprio vigore* bind the laity, except in so far as they are declaratory of the ancient Canon Law (see per Lord Hardwicke, C.J., in *Middleton v. Croft*, 1736, 2 Stra. 1856; 2 Atk. 650). Their authority over the clergy has recently received statutory recognition in the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 12, whereby an offence against morality is defined to include such Acts, etc., as are "proscribed by the 75th and 109th Canons issued by the Convocation of Canterbury in the year 1603." In 1866, and again in 1888, alterations were made by both Convocations in the Canons of 1603, which brought them into harmony respectively with the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), and the Marriage Act, 1886 (49 Vict. c. 14). These alterations were duly enacted under licence from the Crown, and subsequently received the royal assent under the Great Seal.

*Canons of 1640.*—Parliament having been dissolved on May 5, 1640, the question arose whether the Convocations then in session were *ipso facto* dissolved or not, and the following opinion was given on May 10, 1640:—"The Convocation, being called by the King's Writ under the Great Seal, doth continue until it be dissolved by writ or commission under the Great Seal, notwithstanding the Parliament be dissolved." This opinion was signed by the following seven distinguished lawyers, six of whom were sometime holders of high judicial office, viz.:—The Lord Keeper Finch; Henry (Montagu), Earl of Manchester; Bramston, C.J.; Littleton, C.J.; Sergt. Whitfield; Sir John Bankes, A.-G.; and Sir Robert Heath.

Fortified by this opinion the Convocations of Canterbury and York, under licence from the Crown, passed the seventeen Canons of 1640, and they duly received the royal assent under the Great Seal on June 30, 1640 (16 Car. I.). 13 Car. II. c. 12 (s. 5) provides that that Act shall not extend "to confirm the Canons made in the year 1640 or any of them." They have never been abrogated by any synodical act in either province. The Act of Car. II. "leaves them to their own proper synodical authority, and merely provides that nothing in that statute shall give them the force of an Act of Parliament" (Cardwell, *Synodalia*, i. 386). "Several

of them were of such a nature as could give no offence to the temporal Legislature, relating only to the discipline of the Church and clergy and the regulation of the Ecclesiastical Courts" (Gibson, *Codex*, ii. 956). As against the unsupported *dictum* of Sir H. Jenner-Fust, in *Cooper v. Dodd*, 1850, 14 Jur. 724; 7 N. C. 514, that "the Canons of 1640 never had any binding authority in these Courts," may be set their direct recognition by Sir R. Phillimore in *Elphinstone v. Purchas*, 1870, L. R. 3 Ad. & Ec. 66 (at p. 83). See also per Lord Coleridge, C.J., in *R. v. Archbishop of York*, 1888, 20 Q. B. D. 740 (at p. 747). On the whole, there seems to be no sufficient reason for regarding the Canons of 1640 as a body, as in a different category from that of the Canons of 1603.

[*Authorities*.—Lindwood, *Provinciale*; Godolphin, *Rep. Can. or Abr.*; Oughton, *Ordo Judiciorum*; Ayliffe, *Parergon*; Johnson, *English Canons*; Gibson, *Codex*, Oxford ed., 1761; Watson, *Clergyman's Law*; Burn, *Eccl. Law*, 9th ed. (by Phillimore); Rogers, *Eccl. Law*; Stephens, *Laws Relating to the Clergy*; Cripps, *Church Law*, ed. 6, 1886; Phillimore, *Eccl. Law*, ed. 2, 1896.]

**Edition.**—In the case of contracts between publishers and authors, reservations are sometimes made as to the number of "editions" to be issued, and as to the rights and obligations of the parties with regard to the first and subsequent editions. When there is no agreement as to the number of copies constituting an edition, disputes may arise, as in *Reade v. Bentley*, 1858, 27 L. J. Ch. 254. In that case Wood, V.C., defined editions as "the putting forth of a work before the public at successive periods, and whether this is done by moveable type or by stereotype it does not seem to me to make any substantial difference." "The edition," he went on to say, "might be of one, two, three, or any number of thousands of copies, and if a person chose to print twenty thousand and put forth to the public a limited number at a time, each 'issue' of the copies would be 'an edition in every sense of the word.'"

In *Warne v. Routledge*, 1874, L. R. 18 Eq. 497, a publisher who had made a verbal agreement with the author for the publication of a book on "royalty" terms endeavoured to prevent the publication of a new edition of the book by another publisher, on the ground that he should have the exclusive right of publication and sale until all the copies of the first edition were disposed of. The contract between author and publisher contained no express terms to that effect, and Jessel, M. R., in refusing the injunction, held that, although so long as the contract existed it was an exclusive contract, so that no one else, neither the author nor his assignee, could publish the book, yet the author was at liberty to determine the "partnership adventure" at any time, and that on such determination the publishers on the one hand could continue to sell all the copies which they had printed in reliance upon the agreement, and the author on the other hand could at once arrange for the publication of a new edition with another publisher. "It is said," added the Master of the Rolls, "that if you give the publisher no protection, the result may be that the author may publish another edition in a day or two after the publishing of the first edition, and so destroy the value of the remaining copies of the first edition remaining unsold. That may be. And it is said that it is so unreasonable that you must infer some stipulation to prevent it. Why? No doubt partnerships at will have their inconveniences as well as their conveniences. If you want protection for a definite term you must contract for it."

**Editor.**—The editor of a newspaper is the man to whom the proprietor has intrusted the responsibility of deciding what words shall be published in its columns. If he allows anything libellous to appear, he is liable; and so is the proprietor. For the proprietor has given his printers general orders to print whatever the editor sends to press; he is therefore civilly liable for whatever the editor passes, though he never saw it, and even though he has expressly forbidden his editor to publish anything libellous or on the verge of being libellous. In former days the proprietor was also liable criminally (see *R. v. Walter*, 1799, 3 Esp. 21). But that has now been altered; see *ante*, p. 190.

It is the duty, then, of an editor to read carefully all "copy" before it goes to press, and to excise everything that is libellous.

Letters from correspondents are the most frequent source of danger. Persons in the locality whence the letter came will catch the hidden meaning of some apparently general observation, and apply it to the person whom the writer had in his mind. Danger lurks, too, in advertisements, especially in those intended for the agony column. Reports of public meetings were formerly a constant snare; as the editor trusted to the known accuracy of his reporters, and reproduced a full and true account of everything said at the meeting, thinking that he was thereby doing his duty to his readers, and that no action would lie against him for merely placing those who were absent in the same position as those who were present at the meeting. But this view of the duty of an editor was roughly dispelled by two important decisions in actions brought against the proprietor of the *Manchester Courier* (*Purcell v. Souler*, 1877, 2 C. P. D. 215, and *Pankhurst v. Souler*, 1886, 3 T. L. R. 193). Recourse was had to the Legislature; and a somewhat limited privilege was conferred on fair and accurate reports of the proceedings of a public meeting, first by sec. 2 of the Newspaper Libel and Registration Act, 1881, and secondly by sec. 4 of the Law of Libel Amendment Act, 1888. But it still remains the duty of the editor to edit all reports of public meetings, and to excise all matter that is "not of public concern, and the publication of which is not for the public benefit."

Other provisions are contained in these beneficial Acts, restricting the liability of the editor of a paper to criminal proceedings for libel. These are discussed (*ante*, p. 190) under the head of DEFAMATION, *Criminal Law as to Libel*.

**Education.**—The only national system of education at present existing in England is that set up under the Elementary Education Acts. Not that the Legislature has omitted to concern itself with education higher than elementary. For the development of secondary education special powers of dealing with certain educational endowments have been conferred upon the Charity Commission; whilst in view of the recent report of a Royal Commission, it is to be anticipated that secondary education will shortly be the subject of new and comprehensive legislation. Again, special statutory provision has been made for the furtherance of technical instruction by means of pecuniary grants, and, finally, in the domain of higher or University education, the Legislature has imposed special regulations upon particular institutions. But hitherto elementary education is the only kind or "grade" of education which has been systematically dealt with by the law as a whole. The subject-matter of the present article will therefore be confined to elementary education, whilst other educational topics



will be treated under separate heads, *e.g.* ENDOWED SCHOOLS; TECHNICAL INSTRUCTION; UNIVERSITIES; and the same as regards the provision of elementary instruction for special classes of the community (*e.g.* for certified POOR LAW, INDUSTRIAL, AND REFORMATORY SCHOOLS, see POOR LAW, etc.).

It was in the year 1833 that the first grant in aid of education was made by the Government. In 1839, the Education Department was first constituted by an Order in Council, appointing a Committee of the Privy Council to "superintend the application of any sums voted by Parliament for the purpose of promoting public education." But down to the year 1870, the part of the State in the work of education was confined to the distribution of an annual grant in aid of the private efforts of the National Church and other religious denominations. The present system of public education dates from the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), which for the first time cast upon the community the duty of supplying adequate school accommodation in so far as private effort fell short of the needs of the population. To this end, by the Act of 1870, the country is mapped out into school districts. In London the school district is coterminous with the metropolis, in boroughs with the borough, and elsewhere with the parish (*ibid.* First Schedule). Sec. 5 enacts that there shall be provided for every school district a sufficient amount of accommodation in "public elementary schools," available for all the children resident in such district for whose elementary education efficient and suitable provision is not otherwise made, and that where there is an insufficient amount of such accommodation (referred to in the Act as "public school accommodation") the deficiency shall be supplied in manner provided by the Act. An "elementary school" is defined (s. 3) as "a school or department of a school at which elementary education is the principal part of education there given." The looseness of the definition has been of importance in enabling instruction to be given in elementary schools in subjects which can hardly be classed as elementary in the ordinary acceptation of the term. Thus the elasticity of the term "elementary" has in some sort compensated for the want hitherto of a State system of secondary education. The term "public elementary school" has a precise technical meaning. Such a school must be conducted subject to the "conscience clause" (s. 7, subss. 1 and 2); it must at all times be open to the inspection of Her Majesty's inspectors (subs. 3), and it must further be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant (subs. 4).

It is for the Education Department to determine, with respect to every school district, whether there is a deficiency of public school accommodation (s. 8). If they find that there is such a deficiency, they are to publish a notice, setting forth the particulars of the school accommodation required. If any persons being (1) ratepayers of the district, not less than ten, or, if less than ten, representing not less than one-third of the rateable value, or (2) the managers of any elementary school in the district, feel aggrieved by the decision of the Department, they may within one month apply to the Department for a public inquiry, and the Department is thereupon to direct a public inquiry to be held. After the expiration of such month, if no public inquiry is directed, or after the receipt of the report made after such inquiry as the case may be, the Education Department may publish a final notice, directing the requisite accommodation to be supplied (s. 9). If after the expiration of a time not exceeding six months to be limited by the final notice, the Education Department are satisfied that all the public school accommodation required

has not been supplied, nor is in course of being supplied with due despatch, they are to cause a school board to be formed for the district, and send a requisition to the board so formed, requiring them to supply the accommodation (s. 10). If the school board fail to comply with the requisition within twelve months, they are to be deemed to be "in default" (s. 11). So, also, in the case of any failure on the part of a school board to provide additional school accommodation required by the Education Department, or to maintain or keep efficient every school provided by them (s. 18), or to comply with the regulations of the Department (s. 16). In such cases the Education Department may declare the school board to be in default, and appoint persons to act in their place (s. 63). The Education Department may also dissolve such a school board, and cause a new board to be elected (s. 66).

A school board may also be formed after such inquiry, public or other, and such notice as the Education Department think sufficient, in the following cases (s. 12):—(1) On the application of the persons who would elect the school board, and with respect to a borough, by the council (cp. Schedule II. pt. ii.); (2) where the Education Department are satisfied that the managers of any elementary school are unable or unwilling any longer to maintain it, and that if such school is discontinued the public school accommodation for the district will be insufficient. As to the dissolution of a school board where "not required," see Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 41.

A school board is elected under the system known as the cumulative vote, in a borough by the persons whose names are on the burgess roll, and in a parish not situate in the metropolis by the ratepayers (Act of 1870, s. 29). The number of members of the board is such number being not less than five, nor more than fifteen, as is determined in the first instance by the Education Department, and afterwards by a resolution of the board approved by the Education Department (*ibid.* s. 31). Elections are triennial (Schedule II. pt. i. 10, 11). In the metropolis the electors are (s. 37, subs. 6)—(a) in the city the persons who elect common councilmen, i.e. every male person of full age not subject to any legal incapacity, rated for premises at £10 yearly, and every person on the register of parliamentary voters, or entitled to be on the register (12 & 13 Vict. c. 94; 30 & 31 Vict. c. 1); women are thus excluded from the school board electorate for the city of London. (b) In other divisions of the metropolis the electorate is as under the Metropolis Management Acts, i.e. "parishioners." As no qualification is prescribed for membership of any school board, women are eligible for election both in the metropolis and elsewhere. In London, the chairman need not be a member of the school board (s. 37, subs. 9), and may be paid (s. 38), and the numbers of the board can only be altered by reference to the last census (s. 39). A school board is a body corporate, with power to hold land for the purposes of the Act, without licence in mortmain (s. 30, subs. 1). As to the compulsory purchase of land by a school board under the authority of an order of the Education Department to be obtained after certain preliminary formalities, and requiring confirmation by Parliament, see sec. 20. Sites and schoolhouses may be purchased by agreement under the Land Clauses Acts by the managers of any public elementary school (s. 21), whilst the School Sites Acts apply in the case of a school board as if the board were trustees or managers of a school within the meaning of those Acts (s. 20). As to the power of the managers of any elementary school to transfer their school to the school board, see sec. 23. As to the formation of united school districts by the union of two or more districts under one school board, see

secs. 40–48; as to contributory districts, secs. 49–51; and as to the power of school boards to combine, sec. 52.

With regard to the management of schools provided by a school board, sec. 14 of the principal Act provides that every such school must be conducted under the control of the board in accordance with the following regulations:—(1) The school must be a public elementary school within the meaning of the Act; (2) no religious catechism or religious formulary, which is distinctive of any particular denomination, shall be taught in the school,—a provision commonly known as the Cowper-Temple clause.

Industrial schools, as intimated above, do not come within the scope of the present article, but brief reference may here be made to the powers of school boards in relation to this class of schools. A school board has power under the Act of 1870 to contribute to an industrial school (s. 27), also to establish, build, and maintain such a school (s. 28); but a school so established is nevertheless under the jurisdiction of “one of Her Majesty’s Principal Secretaries of State” (*i.e.* the Home Secretary), and subject to the provisions of the Industrial Schools Act, 1886 (29 & 30 Vict. c. 118), and not of the Elementary Education Act (*ibid.*). The same observations apply to the case of “Day Industrial Schools” under the provisions of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 16. *Cp. the Elementary Education (Industrial Schools) Act, 1879 (42 & 43 Vict. c. 48).*

The expenses of a school board under the Act are to be paid out of a fund called the school fund, to which are to be carried all moneys received by the board from the parliamentary grant (which will be explained presently) or otherwise (Act of 1870, s. 53). Any deficiency in the school fund is to be paid by the rating authority out of the local rate, upon a precept served on the authority by the school board (s. 54). A school board has thus unlimited power to draw upon the rates. School boards have also powers of borrowing, subject to the consent of the Education Department, or, in relation to an industrial school, to that of the Secretary of State (39 & 40 Vict. c. 79, s. 15), and to repayment within fifty years, for the provision and enlargement of schoolhouses and other purposes of capital expenditure (Elementary Education Act, 1873, 36 & 37 Vict. c. 86, s. 10).

From what has been already said, it will be seen that the Act of 1870 provided an adequate machinery for the supply of schools. It remains to indicate the successive stages by which education was made first compulsory and next free. The first step in this direction was taken in the Act of 1870, sec. 74 of which empowered, but did not oblige, school boards to make by-laws compelling the attendance at school of children of such age, between five and thirteen, as might be thereby fixed. Any by-law under this section requiring the attendance of a child between the ages of *ten*—now by the Elementary Education (School Attendance) Act, 1893, 56 & 57 Vict. c. 51, s. 1, raised to eleven—and thirteen years, is to provide for the total or partial exemption of such child from the obligation to attend school on reaching a standard of education specified in such by-law. Any of the following reasons excuse attendance—(1) the child being under efficient instruction in some other manner; (2) sickness or any unavoidable cause; (3) want of a public elementary school within such distance not exceeding three miles by road from the child’s residence, as the by-laws may prescribe. All by-laws require the approval of the Education Department, and cannot be enforced until also sanctioned by Order in Council. Any penalty for breach of a by-law may be recovered in a summary manner, but must not exceed with costs the sum of five shillings for each offence.

The Elementary Education Act, 1876 (39 & 40 Vict. c. 79), lays it down (s. 4) to be the duty of the parent of every child—defined (s. 48) to mean a child between the ages of five and fourteen—to cause such child to receive efficient elementary instruction in reading, writing, and arithmetic. Next, this Act forbids (s. 5), under pain of a penalty not exceeding forty shillings (s. 6), any person to take into his employment (s. 5) any child—(1) who is under the age of *ten* (raised by 56 & 57 Vict. c. 51, s. 2, to eleven) years; or (2) who being of the age of *eleven* years or upwards has not obtained such a certificate either of his proficiency in reading, writing, and elementary arithmetic, or of previous due attendance at a certified efficient school (a term which includes a certified Poor Law school) as is in the Act mentioned (Schedule I.), unless such child is employed and is attending school (*i.e.* as a “half-timer”) in accordance with the provisions of the Factory Acts, or of any by-law under the Elementary Education Acts. The standard of proficiency referred to is the fourth or any higher standard (*ibid.* Schedule I.) fixed by a by-law (cp. Elementary Education Act, 1880, 43 & 44 Vict. c. 23, s. 4). But under sec. 9 of the Act of 1876 exceptions are made where there is no public elementary school within two miles of the child's residence measured according to the nearest road, and in cases of employment during holidays or out of school hours. Under sec. 11, known as the “wastrel clause,” a school attendance order may be made, on the complaint of the “local authority,” by a Court of summary jurisdiction in the following cases:—(1) Where a parent habitually neglects to provide efficient elementary instruction for his child; (2) where any child is found habitually wandering, or not under proper control, or in the company of rogues, vagabonds, etc. If the attendance order is not complied with, the parent may be fined, or the child sent to a certified industrial school (s. 12). For the enforcement of the provisions of the Act, the local authority in school districts where there is a school board is that board; for other school districts a new authority is created by the Act, namely, the school attendance committee, appointed annually in a borough by the council, and elsewhere by the guardians, and consisting of not less than six nor more than twelve members of the appointing body (s. 7). The expenses of the local authority are paid out of the borough rate or poor rate, as the case may be (s. 31). For the appointment of a school attendance committee by an urban sanitary authority not a borough, see sec. 33. The Act of 1876 left it optional (s. 21) for the school attendance committee to make by-laws under sec. 74 of the Act of 1870. This defect in the system of compulsory education was supplied by the Elementary Education Act, 1880, 43 & 44 Vict. c. 23, which requires (s. 2) the local authority of every school district to make by-laws respecting attendance at school under sec. 74 of the Act of 1870. Power of enforcing the Act is reserved to the Education Department in case of the default of a local authority (*ibid.* incorporating Act of 1876, s. 27).

Passing to the subject of the parliamentary grant, it may first be noted that the Act of 1870 (s. 96) abolished the building grants which had formerly been made. The same section provides that no parliamentary grant shall be made to any school which is not a public elementary school within the meaning of the Act; and sec. 98 specially empowers the Department to refuse a grant in a school board district to a school not previously in receipt of a grant, if the Department think

such school "unnecessary." The further conditions (s. 97) requisite for the obtaining of an annual grant are to be those contained in the minutes of the Education Department in force for the time being; but no such minute shall be deemed to be in force until it has lain for not less than one month on the table of both Houses of Parliament. The "code" of minutes of the Education Department, dealing with such matters as the approval of buildings and the provision of certificated teachers, is thus of great practical importance, but the examination of a mass of administrative detail, liable to constant modification and rearrangement, hardly falls within the scope of a strictly legal work, and it must suffice here to indicate the statutory limits within which the business of administration has to proceed.

The same section (1870, s. 97) contained a provision to the effect that the grant should not for any year exceed the income of the school for that year which was derived from voluntary contributions, and from school fees, and from any sources other than the parliamentary grant. This was repealed by sec. 19 of the Act of 1876 (39 & 40 Vict. c. 79), which substituted what is known as the 17s. 6d. limit, providing that the grant should not in any year be reduced by reason of its excess above the income of the school if the grant did not exceed seventeen shillings and sixpence per child in average attendance at the school during that year, but should not exceed that amount per child, except by the same sum by which the income of the school, derived from voluntary contributions, rates, school fees, endowments, and any source whatever other than the parliamentary grant, exceeded the said amount per child. The whole of this provision has in turn now been repealed, so far as it applies to day schools, by the Voluntary Schools Act, 1897 (60 Vict. c. 5), s. 2.

Under the Act of 1876, sec. 19, subss. 2 and 3, where the population of the school district in which the school is situate, or the population within two miles by road from the school, is less than three hundred, and there is no other public elementary school available for that district or that population, "a special grant" may be made annually to the amount if the population exceeds two hundred of £10, and if it does not exceed two hundred of £15.

The earlier Elementary Education Acts had contained certain provisions dispensing with the payment of fees in cases of poverty. Provision for general free elementary education was made by the Elementary Education Act, 1891 (54 & 55 Vict. c. 56), by the indirect means of the institution of a "fee grant" out of moneys provided by Parliament. Under this Act a fee grant at the rate of ten shillings a year may be paid for each child over *three* and under *fifteen* years of age in average attendance at any public elementary school not being an evening school (s. 1).<sup>\*</sup> To the receipt of a fee grant the following conditions are attached under the Act:—(i.) Where (a) the average rate of fees received during the year ending the 1st January 1891 was not in excess of ten shillings per child, and (b) where an annual grant was not made before the last-mentioned date, no *fee* may be charged (s. 2). (ii.) Where the average rate was so in excess, a fee may be charged, but so that the average rate of fees does not exceed in any year the amount of the said excess (*ibid.*). (iii.) Where the average rate charged and received in respect of fees and books and for other purposes was not so in excess of ten shillings, no *charge* of any kind may be made for any child over three and under fifteen years of age (s. 3). Notwithstanding the foregoing provisions, however, the Education Department have power under sec. 4 to sanction a fee not exceeding sixpence a week, if they are satisfied *inter alia*

that this will be for the educational benefit of the district; but in practice the Department are understood to be averse to availing themselves of this power. Finally, the Act secures general free education by providing (s. 5) that the expression "public school accommodation" in the Act of 1870 shall include public school accommodation without payment of fees, and that a deficiency of such accommodation shall be supplied in manner provided by the last-mentioned Act.

Poor school boards are entitled to a further grant as follows:—The Act of 1870, s. 97, provides that where the school board satisfy the Education Department that in any year ending the 29th September the sum required for the purpose of their annual expenses and actually paid to their treasurer by the rating authority amounted to a sum which would have been raised by a rate of threepence in the pound, and any such rate would have produced less than £20, or less than seven shillings and sixpence per child of the number of children in average attendance at the public elementary schools of the board, such school board shall be entitled, in addition to the annual parliamentary grant, to such further sum out of moneys provided by Parliament, as when added to the sum actually so paid by the rating authority would, as the case may be, make up the sum of £20, or the sum of seven shillings and sixpence for each such child. The Elementary Education Act, 1897 (60 Vict. c. 16), s. 1, subs. 1, provides that sec. 97 of the Elementary Education Act, 1870, shall have effect as if the sum of seven shillings and sixpence therein mentioned were increased by the sum of fourpence for every complete penny by which the school board rate for the year therein mentioned exceeded threepence; but so that the sum of seven shillings and sixpence shall not be thereby increased beyond a maximum of sixteen shillings and sixpence.

Great importance attaches to the Voluntary Schools Act, 1897 (60 Vict. c. 5). Under sec. 1, subsec. 1, of this Act there is to be paid annually for aiding voluntary schools an aid grant not exceeding in the aggregate five shillings per scholar for the whole number of scholars in average attendance. In respect of the distribution of this grant, as of the administration of the Act generally, very wide discretionary powers are reserved to the Education Department, "due regard being had to the maintenance of voluntary subscriptions" (s. 1, subs. 2). Associations of schools are to be constituted in such manner and with such governing bodies representative of the managers as are approved by the Education Department. The grant is to be paid to such associations, and different rates may be fixed by the Department for town and country schools (s. 1, subs. 3). The share allotted to each association is to be distributed by the Education Department after consulting the governing body of the association, and in accordance with any scheme prepared by that body which the Department for the time being approve (s. 1, subs. 4). Audit of accounts may be required (s. 1, subs. 6). And the Education Department may exclude a school from any share of the aid grant if in the opinion of the Department it unreasonably refuses or fails to join such an association; but the refusal or failure is not to be deemed unreasonable if the majority of the schools in the association belong to a religious denomination to which the school in question does not itself belong (s. 1, subs. 5). Under sec. 3 voluntary schools are exempted from rates, and by sec. 4 a voluntary school is defined to mean a public elementary day school not provided by a school board.

In conclusion, it may be convenient, especially in view of the strengthening of voluntary schools by the last-mentioned Act, to summarise shortly the leading statutory provisions affecting religious instruction. (1) No grant

may be made in any public elementary school in respect of any instruction in religious subjects (Act of 1870, s. 97, subs. 1), and (2) it is no part of the duties of any of Her Majesty's inspectors to inquire into religious instruction, or examine in any religious subject or book (*ibid.* s. 7, subs. 3). (3) In a board school, as has been mentioned above, no religious catechism or religious formula which is distinctive of any particular denomination may be taught (*ibid.* s. 14, subs. 2). (4) Under sec. 7, subsec. 1, of the same Act, it is not to be required in any public elementary school as a condition of a child being admitted into or continuing in the school, that he shall attend or abstain from attending any Sunday school or place of religious worship, or that he shall attend at any religious observance or instruction in the school, or attend school on any day exclusively set apart for religious observance by the religious body to which his parent belongs. (5) The time for any religious observance or instruction must be either at the beginning or end of the meeting of the school, and must be inserted in a time-table approved by the Education Department and kept permanently and conspicuously affixed in every schoolroom (*ibid.* s. 7, subs. 2). (6) Lastly (*ibid.* s. 76), for inspection "as well in respect of religious as of other subjects" by an inspector other than one of Her Majesty's inspectors, the managers may fix a day or days not exceeding two in any one year. Fourteen days' notice of such inspection must be affixed in the school, and no scholar who has been withdrawn from religious instruction is to be required to attend on any such day.

[*Authorities.*—See Owen, *Elementary Educational Acts*, 1880, 1891; Mackenzie, *Elementary Educational Acts*, 1895.]

**Eels.**—The eel was supposed by the judges (*Price v. Bradley*, 1885, 16 Q. B. D. 149) to be a fresh-water fish within the Act of 1878 (41 & 42 Vict. c. 39, s. 11), but Parliament in 1886 declared this opinion to be erroneous (49 & 50 Vict. c. 2), subject to a proviso that the Act should not legalise angling for eels in the close season, 15th March to 15th June, except by leave of the owner of the fishing, or the conservators, if any, of the Fishery District. The object of the proviso seems to be to prevent anglers from making eel-fishing an excuse for angling in close time; but if eels are not fresh-water fish, there seems no direct prohibition on catching them in any way in close time. In salmon rivers, baskets, nets, traps, or devices for catching eels must not be set between 1st January and 24th June, both inclusive (36 & 37 Vict. c. 71, s. 15).

**Effect—Effects.**—See Stroud, *Jud. Dict.*; and WILLS; WORDS.

**Eggs.**—See BIRDS; GAME; and as to seizure of rotten eggs in London and elsewhere, see PUBLIC HEALTH.

**Egypt.**—A country at the north-eastern extremity of Africa, which formed the basis of one of the great empires of the ancient world. After a long experience of Macedonian and Roman rule, Egypt was conquered by Mohammedan Powers, more or less dependent on the Caliphs of Damascus and Bagdad; in 1517 it was added to the dominions of the Turk. The French occupation of 1798–1801 affected the laws and institutions of the country to a considerable extent. In 1806–11 an Albanian soldier, Mehemet

Ali, made himself master of Egypt; his rights were recognised by Turkey and the Powers in 1841; in 1866 his grandson Ismail obtained a firman conferring upon him the hereditary title of Khedive, and fixing the order of succession. The Sultan's rights are now limited to the receipt of his annual tribute; but in the case of *The Charkieh*, 1873, L. R. 4 Ad. & Ec. 59, 120, Sir R. Phillimore held that the Khedive could not be regarded as a sovereign prince. Financial difficulties led to the establishment of a joint control under French and English advisers; since 1882 the control has been in English hands, and the British Consul-General at Cairo has been engaged in reorganising the whole internal administration of the country. The Consular Courts, established by various European Powers under the CAPITULATIONS, were superseded in 1876 by the Mixed Tribunals, which deal with all cases in which foreigners and foreign authorities are concerned. The native Egyptian Courts have been created or thoroughly reformed by Sir John Scott, judicial adviser to the Government of the Khedive; a Court of Appeal has been established at Cairo, and great efforts have been made to improve the local administration of justice. In the collection of taxes Oriental methods are no longer permitted; receipts are given which protect the *fellah* against being made to pay twice; the *corvée* or forced labour has been abolished or brought under strict regulation. The law of modern Egypt is embodied in the *Codes Egyptiens*, which are framed on a French model, but present an admixture of Mohammedan law. The Mohammedan University of El Azhar at Cairo professes to teach law among other things, but Egyptian students of good family have been in the habit of going to Aix or Paris to study French law. The British authorities are endeavouring to form a school of law at Cairo.

[*Authorities.*—For the laws of ancient Egypt, see Chabas, *Mélanges Égyptologiques*, vol. iii.; for the modern law, the text of the *Codes*, and the Ordinances, made from time to time for the reform of the judiciary, etc. The *Règlement* for the Mixed Tribunals will be found in Hertslet's *Treaties*, xiv. 305.]

**Either.**—See Stroud, *Jud. Dict.* s.v. "Either"; and WILLS; WORDS.

**Ejectment.**—See RECOVERY OF LAND.

**Ejusdem generis, rule of.**—See INTERPRETATION.

**Election.**—*Nature of the Doctrine.*—It is a familiar principle conformable to good sense and natural justice that a man cannot approbate and reprobate—that he cannot accept a benefit under an instrument without adopting the whole of it—conforming to all its provisions, and renouncing every right inconsistent with them. His doing so is an implied condition of the benefit. This principle or implied condition is the ground of the equitable doctrine of election (*Streatfield v. Streatfield*, 1735, Ca. t. Talb. 176; *Noys v. Mordaunt*, 1706, 2 Vern. 581; *Dillon v. Parker*, 1818, 1 Swans. 359, 381 n, 394 n; 18 R. R. 72; *Rogers v. Jones*, 1876, 3 Ch. D. 688). It may be made clear by an illustration. Suppose that a testator by his will gives Blackacre, which is not his property but A's property, to B., and by the same will gives Whiteacre, which is the testator's own



property, to A. In such a case A. cannot keep Blackacre and also claim Whiteacre. That would be approbating and reprobating. He must elect between two courses, to take under the will or against it. If he elects to take under the will he must conform to it by conveying Blackacre to B. If he elects to take against the will, he keeps Blackacre, but he can only get Whiteacre on the terms of making compensation to B. for the loss of Blackacre. This theory of compensation, which has been engrafted by the authorities on the original doctrine of election, rests like the doctrine itself on the implied intention of the donor. It works out in this way. Blackacre may be an estate worth £20,000, while Whiteacre may be worth £30,000; but Blackacre may have a *pretium affectionis* for its owner, and A. elects to take against the will. Equity in such a case assumes jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to the person whom his election disappoints. In the supposed case the amount, measured in money, of B.'s disappointment is £20,000. A., therefore, takes Whiteacre, subject to giving up that money value of Blackacre to B. (*Gretton v. Haward*, 1818, 1 Swans. 443, 444; 18 R. R. 95; *Pickersgill v. Rodger*, 1877, 5 Ch. D. 163), and this equity of compensation B. may enforce by action.

*What will Raise.*—To raise a case of election there must appear in the instrument whether it is a will or a settlement, for it applies equally to both (*Green v. Green*, 1816, 2 Mer. 86; 13 R. R. 277; *Codrington v. Lindsay*, 1872, L. R. 8 Ch. 578, 587), a clear intention on the part of the donor or settlor to dispose of property which is not his own. Whether he erroneously believed it to be his own or knew it not to be his own, makes no difference, but the Court leans as far as possible to a construction which would make him deal only with that to which he is entitled (*Maddison v. Chapman*, 1861, 1 John. & H. 470; *In re Bidwell's Settlement*, 1862, 11 W. R. 161). Thus a general devise, *prima facie*, passes only property of which the deviser is owner, and the Court will not admit evidence dehors the will to show that the testator intended to comprise in a general devise property which he believed to be his own, but which, in fact, was not his own, for the purpose of raising a case of election (*Blake v. Bunbury*, 1789, 1 Ves. Jun. 523; 1 R. R. 111; *Sutton v. Best*, 1791, 1 Ves. Jun. 284; *Clementson v. Gandy*, 1836, 2 Keen, 309). The intent of the testator to dispose of property which is not his must appear on the will (*Blake v. Bunbury*, *supra*). If a testator or grantor has only a partial interest in property, and disposes of the whole, giving some of his own property to the owner of the other part, the same principle applies, and the part owner legatee must elect (*Howell v. Jenkins*, 1863, 1 De G., J. & S. 617).

To found a case of election the person benefited must be entitled in his own right to the property given to another, and not in his representative capacity (*Grissell v. Swinhoe*, 1868, L. R. 7 Eq. 291; *Cooper v. Cooper*, 1870, L. R. 6 Ch. 15; *affd.* 1874, L. R. 7 H. L. 53).

Persons bound to elect are not compellable to do so until all the circumstances which may influence their election are known to them: for instance, the relative value of the properties (*Newman v. Newman*, 1 Bro. C. C. 186; *Wake v. Wake*, 1791, 3 Bro. C. C. 254), and for this purpose accounts will, if necessary, be directed to be taken (*Boynton v. Boynton*, 1785, 1 Bro. C. C. 445; *Douglas v. Douglas*, 1871, L. R. 12 Eq. 617). An election made under a mistake will not be held binding (*Pusey v. Desbouverie*, 1734, 3 P. Wms. 315; *Dillon v. Parker*, 1833, 1 Cl. & Fin. 303).

*What will Constitute.*—Election may be express, but it may also be implied. What will lead the Court to infer an election must, depend on the

circumstances of each particular case. Receipt of rents, settling one of the two funds, lapse of time, are some of the acts evidencing acceptance or acquiescence, but to make them effectual for that purpose the person alleged to have elected must have done them with a knowledge of his rights, and with the intention of electing (*Stratford v. Powell*, 1807, 1 Ball. & B. 1; *Brown v. Brown*, 1866, L. R. 2 Eq. 481). Illustrations are furnished by *Wake v. Wake*, 1791, 1 Ves. Jun. 334; *Padbury v. Clark*, 1849, 2 Mac. & G. 298; *Tibbitts v. Tibbitts*, 1816, 19 Ves. 656, 663; *Tomkyns v. Ladbroke*, 1754, 2 Ves. 593. If necessary, the question of election or no election may be ordered to be tried by a jury (*Roundell v. Curren*, 1786, 2 Bro. C. C. 66, 73; 1 Swans. 382, 383 n). If a time is limited for electing, and the person to elect does not do so within the time limited, he will be considered as having elected to take against the instrument. As to the effect of a person under an obligation to elect dying without electing, see *Fytche v. Fytche*, 1868, L. R. 7 Eq. 490, and *Pickersgill v. Rodger*, 1877, 5 Ch. D. 163, 175.

*Under Appointments in Execution of Powers.*—A good illustration of the doctrine of election is furnished by powers. Suppose a fund appointable by will by a father among the children, in default of appointment to go equally among all the children. The father by will appoints part of the fund among his children, and the residue of the fund to a stranger to the power. This is a fraud on the power, and no case of election is raised against the children. They can keep the shares appointed them, and also claim as in default of appointment the share given to the stranger (*Bristow v. Warde*, 1784, 2 Ves. Jun. 336; 2 R. R. 235; *In re Fowler's Trust*, 1859, 27 Beav. 362), and the reason assigned by Lord Wedderburn is that there must be some free disposable property given to the person whose property is dealt with which can be made a compensation for what the appointer takes away; and in the illustration given there is no such free disposable property, no property is comprised in the will, but that which the father had power to distribute. If there is, if the father by the will, exercising his power of appointment in favour of a stranger to the power, gives also property of his own to the children, a case of election arises. The donee of the power has purchased the right to put an alternative to the object of the power. Merely precatory words requesting appointees, objects of the power, to leave the fund appointed to others not objects of the power will not raise a case of election (*Carver v. Bowles*, 1831, 2 Russ. & M. 301; but see 13 L. R. Ir. 531).

*Dower.*—Questions of election in relation to dower, which were very common under the old law, now seldom arise, owing to the large powers given to a husband by the Dower Act to bar dower by sale or declaration.

*Who bound to Elect.*—Election implies the exercise of a rational judgment by a person *sui juris*. Persons under disability are incompetent to this exercise of such a discretion. Hence an infant, a lunatic, or a *feme covert* under the old law cannot elect. In the case of an infant, election is deferred,—as a rule—till the infant comes of age (*Broughton v. Broughton*, 1750, 2 Ves. 12); but the Court may, where it is advisable, elect for the infant at once, if the infant's interest is clear. If it is doubtful, the Court may refer it to chambers to inquire what will be most beneficial to the infant (*Chetwynd v. Fleetwood*, 1742, 1 Bro. P. C. 309; *Prole v. Soady*, 1859, 8 W. R. 131; *Lamb v. Lamb*, 1856, 5 W. R. 772). The practice with regard to lunatics is similar. The Court refers it to chambers to report what would be most beneficial to the lunatic, and, on the result of this report being certified, elects accordingly for the lunatic. This jurisdiction applies equally whether the lunatic is one so found or not. See LUNACY.

**Married Women.**—A married woman in respect of non-separate property cannot elect (*Cooper v. Cooper*, 1874, L. R. 7 H. L. 53; see, however, *Ardesoife v. Bennet*, 1772, 2 Dick. 463; *Nicholl v. Jones*, 1866, L. R. 3 Eq. 696); but in respect of property belonging to her for her separate use a married woman is in the same position as a *feme sole*, and competent and compellable to elect. If, however, the separate use has annexed to it a restraint on anticipation, no case of election arises, and the reason is this, that the value of the married woman's property in such a case to be relinquished by way of compensation has, by the terms of the instrument, been rendered inalienable (*In re Wheatley, Smith v. Spence*, 1884, 27 Ch. D. 606). The general intention that every part of an instrument shall take effect is rebutted by the inconsistent particular intention apparent in the instrument, that the married woman shall be restrained from anticipation (*In re Vardon's Trusts*, 1885, 31 Ch. D. 275; *Carter v. Silber*, [1891] 3 Ch. 553).

**Legacy and Succession Duty.**—As to the effect of the doctrine on legacy and succession duty, see *Laurie v. Clutton*, 1852, 15 Beav. 131; and *Hanson, P. L. & S. Duty*.

As to election in cases of concurrent actions, see STAY OF PROCEEDINGS.

[**Authorities.**—White and Tudor, *Lea. Cas.*, 6th ed., 397–436; Watson, *Practical Compendium of Equity*, 2nd ed., 176; Vaizey, *Sett.*; Seton, *Decrees*, 4th ed., 1339; H. A. Smith, *Principles of Equity*, 2nd ed.; Snell, *Principles of Equity*; Flood on *Election*, 1880.]

**Election Agent.**—The term “election agent” previously to the passing of the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, was used to denote the person intrusted with the conduct and management of the business of a parliamentary election. The office of Election Agent in its present sense, however, was created by the Act of 1883, which requires the appointment of an Election Agent on whom specific and stringent duties and responsibilities are imposed with regard to the making of contracts involving, and the payment and return of, election expenses.

In creating the statutory office of Election Agent the purpose of the Legislature was to secure the appointment of a person who should be effectively responsible for all the acts done in procuring the election, and more especially to provide an efficient means for the control and regulation of election expenses. The object of the Act, it has been said, was that the affairs of the election should be carried on in the light of day, and that a respectable and responsible man, responsible to the candidate and to the public, should be there to do all that was necessary” (per Field, J., *Barrow-in-Furness*, 1886, 4 O'M. & H. 83).

• **Who may be Election Agent.**—Owing to the liability entailed upon the candidate, extreme caution is requisite in the selection of an Election Agent, who should be a person not only experienced in the general management of an election, but also fully acquainted with election law, and especially the provisions of the Corrupt and Illegal Practices Prevention Acts.

There being no essential legal qualification, as a general rule, any person, whether an elector or a non-elect, may be appointed Election Agent, though where an elector is appointed he may not vote (see Corrupt and Illegal Practices Prevention Act, 1883, Sched. I. Part I. (7)). But no returning officer for any county or borough, nor his deputy, nor any partner or clerk of either of them, can be appointed Election Agent, sec. 50. of the Represent-

tation of the People Act, 1867, 30 & 31 Vict. c. 102, providing that no such person may act for any candidate in the management or conduct of his election, and if any such person does so act he is guilty of a misdemeanour. This section is by the Ballot Act, 1872, 35 & 36 Vict. c. 33, s. 11, applied to any returning officer or officer appointed by him in pursuance of that Act and to his partner or clerk. And a person who has previously been found or reported guilty of corrupt practices must not be appointed Election Agent, the Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125, s. 44, enacting that if on the trial of any election petition any candidate is proved to have personally engaged as agent for the management of the election any person knowing that such person has within seven years previous to such engagement been found guilty of any corrupt practice by any competent legal tribunal, or been reported guilty of any corrupt practice by a Committee of the House of Commons, or by election judges, or by Election Commissioners, the election of such candidate is to be void.

It is, moreover, not advisable to appoint a registration agent, or an officer, such as the chairman or secretary, of a local political association, as Election Agent, there being in such cases considerable danger from the possibility of the confusion of the registration expenses with the election expenses, and from the possible responsibility of the candidate for the acts of the association. In two recent cases candidates have been unseated owing to the acts of their Election Agent, who in each case was the secretary of a political association (as to this, see *Hexham*, 1892, 4 O'M. & H. 145; *Rochester*, 1892, *ibid.* 158, Day's El. Cas. 99; see also *Stepney*, Day's El. Cas. 118).

*Appointment of Election Agent.*—On or before the day of nomination at an election a person must be named by or on behalf of each candidate as his agent for the election; such person is termed the "Election Agent" (Corrupt and Illegal Practices Prevention Act, 1883, s. 24 (1)). Where a candidate is nominated in his absence, an Election Agent must be named on his behalf; in such case this might be done by one of the persons nominating or seconding the candidate. In most cases, however, the Election Agent is appointed by the candidate personally.

The appointment of an Election Agent is obligatory, but the Act expressly enables a candidate to name himself as his own Election Agent, in which case he becomes, so far as circumstances admit, subject to the provisions of the Act both as a candidate and as an Election Agent (*ibid.* s. 24 (2)).

The appointment need not necessarily be in writing, a verbal appointment being in law sufficient; it is, however, usual and certainly most advisable in the interests both of the candidate and of the Election Agent for the appointment to be in writing.

The name and address of the Election Agent of each candidate must on or before the day of nomination be declared in writing by the candidate or some other person on his behalf to the returning officer, who must forthwith give public notice of the name and address of every Election Agent so declared (*ibid.* s. 24 (3)). As to the mode of giving such notice, see *ibid.* s. 62 (1), and the Ballot Act, 1872, Sched. I. r. 46.

Only one Election Agent may be appointed for each candidate (*ibid.* s. 17 (1) and s. 24 (4); see also Sched. I. Part I. (1)). The same individual may be appointed as Election Agent on behalf of two or more candidates at an election, but this would create a joint candidature (see CANDIDATE).

*Change of Election Agent.*—The appointment of an Election Agent may be revoked, and in the event of such revocation or the death of the Election

Agent before, during, or after the election, another Election Agent must be forthwith appointed, and his name and address declared in writing to the returning officer, who must publicly notify the same (*ibid.* s. 24 (4)).

*Remuneration.*—The Election Agent may be legally employed for payment (see *ibid.* s. 17 (1), and Sched. I. Part I. (1)). The amount of the fee or remuneration should be agreed upon at the time of the appointment, and where the appointment is in writing, which as a matter of precaution it should always be, the amount of the remuneration should be specified; but a proviso may be, as indeed it frequently is, inserted for reducing it, if necessary, so as to insure that the maximum allowed for election expenses will not be exceeded.

So far as circumstances admit, the Corrupt and Illegal Practices Prevention Act, 1883, is to apply to a claim by an Election Agent for his remuneration, and to the payment thereof, in like manner as if he were any other creditor; and if any difference arises respecting the amount of such claim, it is to be dealt with as a disputed claim within the meaning of the Act (s. 32 (1)). The Election Agent may therefore, if he thinks fit, bring an action for it in any competent Court (*ibid.* s. 29 (8)).

*Deputy Election Agent, Sub-Agents.*—In county elections, the Election Agent may appoint one deputy Election Agent, who is usually termed a sub-agent, to act within each polling station and no more (*ibid.* s. 25 (1), and Sched. I. Part I. (2)). The Election Agent must, one clear day before the polling, declare in writing the name and address of every sub-agent to the returning officer, who must forthwith give public notice of the same (*ibid.* s. 25 (3)). The Election Agent may, as regards matters in a polling district, act by the sub-agent for that district, and anything done for the purposes of the Act by or to the sub-agent in his district is to be deemed to be done by or to the Election Agent; and any act or default of a sub-agent which if he were the Election Agent would be an illegal practice or offence against the Act is to be an illegal practice or offence against the Act committed by the sub-agent, rendering him liable to punishment accordingly, and the candidate will suffer the like incapacity as if it were the act or default of the Election Agent (*ibid.* s. 25 (2)).

It will be observed that the authority of a sub-agent is limited to his particular district, but within that district he is practically in the position of Election Agent.

*Election Agent's Office.*—The Election Agent must have within the county or borough, or within any county of a city or town adjoining thereto, and each sub-agent must have within his district, or within any county of a city or town adjoining thereto, an office or place to which all claims, notices, writs, summonses, and documents may be sent, and the address of such office is to be declared to the returning officer at the same time as the appointment of the agent (*ibid.* s. 26 (1)). Any document delivered at such office and addressed to the Election Agent, or sub-agent, as the case may be, is to be deemed to have been served on him (*ibid.* s. 26 (2)).

*Declaration of Secrecy.*—The Election Agent and every sub-agent must, before the opening of the poll, make a statutory declaration of secrecy in the presence of a justice of the peace or of the returning officer (Ballot Act, 1872, 35 & 36 Vict. c. 33, Sched. I. Part I. r. 54).

*Duties of Election Agent.*—It is the duty of the Election Agent in the general management and conduct of the election to comply with the provisions of the Corrupt and Illegal Practices Prevention Acts, and to take all reasonable means for preventing the commission of corrupt and illegal practices (see the Corrupt and Illegal Practices Prevention Act,

1883, s. 22 (b)). "He must superintend the canvassing, and keep a record of every canvass-book issued by him (see *Lichfield*, 1895; see also CAN-VASSING).

Every polling agent, clerk, and messenger employed for payment on behalf of the candidate at an election must be appointed by the Election Agent either acting by himself or by his sub-agent (*ibid.* s. 27 (1)). The number of persons who may be legally employed for payment in such capacities is regulated by Sched. I. Part I. of the same Act, and care must be taken not to exceed this number. The Election Agent should exercise extreme care in the selection of such persons, he should expressly instruct them as to their duties, and caution them against the commission of election offences. All appointments made by the Election Agent should be in writing, and the amount of the remuneration should be specified. The Election Agent should enter in a book who are the responsible people, who are the agents, who are the clerks, who are the canvassers, and so on, and if that is done, at any rate he cannot be complained of for not having done his duty (per Cave, J., *Pontefract*, 1893). All persons employed by the Election Agent for payment should be expressly warned that they must not vote (see *Stepney*, 1892, Day's El. Cas. 117). Every committee room hired on behalf of a candidate must be hired by the Election Agent either acting by himself or by his sub-agent. The number of committee rooms is regulated by the Corrupt and Illegal Practices Prevention Act, 1883, Sched. I. Part II. (6) and (7), and must not be exceeded. The expression "committee room" is defined, *ibid.* s. 64; see also as to committee rooms, *ibid.* s. 20.

All contracts relating to the election must be made through the Election Agent. A contract whereby any expenses are incurred on account of or in respect of the conduct or management of an election is not enforceable against a candidate at such election, unless made by the candidate himself, or by his Election Agent either by himself or by his sub-agent; this inability to enforce such contract against the candidate does not, however, relieve the candidate from the consequences of any corrupt or illegal practice having been committed by his agent (*ibid.* s. 27 (2)).

All payments in respect of any expenses incurred on account of or in respect of the conduct or management of an election must, with some few exceptions, be made through the Election Agent (*ibid.* s. 28; see also s. 31), who after the election has to transmit a return and declaration respecting the election expenses to the returning officer (*ibid.* s. 33).

The duties of the Election Agent in connection with the payment and return of the election expenses are undoubtedly the most important of his functions; for further information as to which, see ELECTION EXPENSES.

The Election Agent should also be very careful to keep books showing particulars of every item of his expenditure in connection with the election. The loss or destruction of accounts by an Election Agent is always severely commented on by judges at the trial of election petitions (see, for example, per Cave, J., *Stepney*, 1892, Day's El. Cas. 37).

*Liability of Candidate for Acts of Election Agent.*—The nature of the liability of a candidate for the acts and neglects of his Election Agent is treated of in the articles on AGENCY, ELECTION; CANDIDATE; CORRUPT PRACTICES; ILLEGAL PRACTICES; RELIEF.

*Municipal and other Elections.*—The office of Election Agent, in its

statutory sense, exists only with regard to parliamentary elections. It may, however, here be mentioned that an agent for the general management of the election may be appointed at a municipal election, but in such case he must not be paid any remuneration for his services, as the employment of any paid agent, except certain clerks and messengers, and one polling agent in each polling station, would be an illegal employment within the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 & 48 Vict. c. 70, s. 13. So, also, in the case of other elections, agents may be legally employed, but, with the exception of a polling agent, may not be paid.

**Election Commissioners.**—Election Commissioners are persons appointed by the Crown on a joint address of both Houses of Parliament for the purpose of making inquiry into the existence of corrupt practices at parliamentary elections.

Having regard to the successful operation of the Corrupt and Illegal Practices Prevention Acts, and, in particular, the provisions respecting the attendance of the public prosecutor at the trial of election petitions, and the prosecution by him of offenders (see the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, s. 43), the necessity for the appointment of Election Commissioners is very considerably reduced. Nevertheless, the means for the appointment of an election commission are still in existence, and may at any time be put into execution.

*Appointment of.*—Election Commissioners may be appointed under the powers conferred by the Election Commissioners Act, 1852, 15 & 16 Vict. c. 57, which was passed to provide for more effectual inquiry into the existence of corrupt practices at elections. Sec. 1 enacts that where by a joint address of both Houses of Parliament it shall be represented to the Crown that a committee of the House of Commons appointed to try an election petition, or a committee of that House appointed to inquire into the existence of corrupt practices at any parliamentary election, have reported to the House that corrupt practices have, or that there is reason to believe that corrupt practices have, extensively prevailed in any county, division of a county, city, borough, university, or place in the United Kingdom electing or sharing in the election of a member or members to serve in Parliament, at any election or elections of such member or members, and the said Houses shall thereupon pray the Crown to cause inquiry to be made under the Act by persons named in the address, it shall be lawful for the Crown, by warrant under the Royal Sign Manual, to appoint the said persons to be Commissioners for the purpose of making inquiry into the existence of such corrupt practices.' The trial of election petitions is now delegated to the judges of the Queen's Bench Division for the time being upon the rota of election judges (see ELECTION PETITION), and the report of the judges on the trial of an election petition as to the prevalence of corrupt practices in any county or borough at the election to which the petition relates, has, for all the purposes of the Election Commissioners Act, 1852, the same effect, and may be dealt with in the same manner, as if it were a report of a committee of the House of Commons appointed to try an election petition (see the Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125, s. 15). Election Commissioners may, therefore, be appointed upon an address of both Houses in consequence of the report of the election judges on the trial of an election petition.

Election Commissioners may also be appointed by the Crown on an address of both Houses of Parliament in consequence of a petition to the House of Commons, signed by two or more electors, and presented within twenty-one days after the return of a member, or within fourteen days after the meeting of Parliament, alleging the prevalence of corrupt practices at the then last election for the borough or county (*ibid.* s. 56).

*Who may be.*—The Election Commissioners, usually three in number, are the persons named in the address; such persons, where the inquiry to be made relates to a place in England or Ireland, must be barristers-at-law of not less than seven years' standing, or, where the inquiry relates to a place in Scotland, advocates of not less than seven years' standing. They must not be members of Parliament, and must not hold any office or place of profit under the Crown other than that of a recorder of any city or borough (Election Commissioners Act, 1852, s. 1).

*Death, Resignation, etc.*—In case any of the Commissioners appointed die, resign, or become incapable to act, the surviving or continuing Commissioners or Commissioner have power to act in the inquiry as if they or he had been solely appointed for the purposes of the inquiry (*ibid.*).

*Oath.*—Every Commissioner before beginning to act must take an oath that he will truly and faithfully execute the powers and trusts vested in him according to the best of his knowledge and judgment (for form of oath, see *ibid.* s. 2). Such oath is to be taken before a judge of the Queen's Bench Division, and in Scotland before a judge of the Court of Session (*ibid.*).

*Appointment of Secretary, Clerks, etc.*—The Commissioners have power to appoint and dismiss at pleasure a secretary, and so many clerks, messengers, and officers, as a Secretary of State may deem necessary for the purpose of conducting the inquiry, and to pay them such salaries as the Treasury deem reasonable (*ibid.* s. 3).

*Notice of Appointment of Commissioners.*—Notice is required to be given by the Commissioners of their appointment, and of the time and place of holding their first meeting. This is to be published in some newspaper in general circulation in the neighbourhood of the place for which the inquiry is to be held (*ibid.* s. 4).

*The Inquiry.*—Upon their appointment, or within a reasonable time afterwards, the Commissioners must go to the county, division, city, borough, university, or place in respect of which the inquiry is instituted, and from time to time hold meetings for the purposes of the inquiry at some convenient place within the same, or within ten miles thereof (*ibid.* s. 4). The meetings of the Commissioners may, however, with the consent and approbation of a Secretary of State, be held in London or Westminster (*ibid.* s. 5).

It is the duty of the Commissioners, by all such lawful means as to them appear best with a view to the discovery of the truth, to inquire into the manner in which the election has been conducted, and whether any corrupt practices have been committed at such election, and, if so, the nature of the corrupt practices (*ibid.* s. 6). Moreover, it being deemed expedient to extend such an inquiry to the case of illegal practices, it was enacted by the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, s. 12, that when Election Commissioners have been appointed in pursuance of the Election Commissioners Act, 1852, and the enactments amending the same, they may make inquiries and act and report as if "corrupt practices" in such enactments included illegal practices. The Commissioners have



therefore to inquire as to the existence of illegal practices as well as of corrupt practices. In case they find that corrupt or illegal practices have been committed at the election into which they are authorised to inquire, they are empowered to make the like inquiries concerning the latest previous election for the same place, and upon their finding corrupt or illegal practices to have been committed, they may make the like inquiries concerning the election immediately previous thereto for the same place, and so in like manner from election to election as far back as they may think fit (*ibid.* s. 6). But in no case may they make any inquiries concerning any election prior to the passing of the Corrupt and Illegal Practices Prevention Act, 1883 (see s. 49 of that Act). And where upon inquiry concerning any election they do not find that corrupt or illegal practices have been committed, they are not to inquire concerning any previous election (Election Commissioners Act, 1852, s. 6).

*Witnesses, etc.*—The Commissioners have full power, by summons under their hands and seals, to secure the attendance of all witnesses whose evidence may be material to the subject-matter of the inquiry, and to require the production of all such books and documents as may be necessary (*ibid.* s. 8). If any witness summoned by the Commissioners fails to appear, he will, upon being reported by them to any of the superior Courts, incur the same penalties as if he had failed to obey a writ of subpoena (*ibid.* s. 12). The Commissioners are empowered to administer an oath or affirmation to the witnesses who are examined before them (*ibid.* s. 11), and if any person, summoned to attend and having appeared, refuses to be sworn, or to give evidence, or to produce any papers, etc., which are in his possession or under his control, or, if any person is guilty of contempt of the Commissioners, they may exercise the same powers as any judge of the superior Courts (*ibid.* s. 12). Any witness giving false evidence before the Commissioners is liable to the penalties of perjury (*ibid.* s. 13). As to the allowance of the reasonable expenses of witnesses, see *ibid.* s. 14.

A witness before Election Commissioners will not be excused from answering any question relating to any offence at or connected with the election on the ground that the answer thereto may criminate or tend to criminate himself, or on the ground of privilege, but if he answers truly all questions which he is required to answer he will be entitled to receive a certificate of indemnity (as to which, see the Corrupt and Illegal Practices Prevention Act, 1883, s. 59; see also *R. v. Hulme*, 1870, L. R. 5 Q. B. 377). It has been held that the decision of the Commissioners in refusing to grant a certificate of indemnity to a witness is final (*R. v. Holl*, 1881, 7 Q. B. D. 575).

*Adjournment.*—The Commissioners have power to adjourn their meetings held for the purposes of the inquiry from time to time, and from any one place to any other place within the county, division, city, borough, university, or place, or within ten miles thereof, as to them may seem expedient. They may not, however, adjourn the inquiry for any period exceeding one week without the consent and approbation of one of the principal Secretaries of State (Election Commissioners Act, 1852, s. 4).

*Report of Commissioners.*—The Commissioners are required from time to time to report to the Crown the evidence taken by them, and what they find concerning the premises, and especially they are to report with respect to each election the names of all persons whom they find to have been guilty of corrupt and illegal practices at such election (*ibid.* s. 6). Every such report is to be laid before Parliament within one month after it is

made, or if Parliament be not then sitting then within one month after the then next meeting of Parliament (*ibid.* s. 7). When reporting that certain persons have been guilty of any corrupt or illegal practice, the Commissioners must report whether those persons have or have not been furnished with certificates of indemnity, and such report, accompanied with the evidence on which it was based, is to be laid before the Attorney-General with a view to his instituting or directing a prosecution against such persons as have not received certificates of indemnity, if the evidence should, in his opinion, be sufficient to support a prosecution (Corrupt and Illegal Practices Prevention Act, 1883, s. 60). As to the report of corrupt practices by justices of the peace, barristers, solicitors, or other professional persons, and of persons holding licences, see *ibid.* s. 38 (6)–(9).

Before any person is reported to have been guilty at an election of any corrupt or illegal practice, notice must be given to him, and if he appears in pursuance of the notice he is to have an opportunity of being heard by himself (see *R. v. Mansel Jones*, 1889, 23 Q. B. D. 29), and of calling evidence in his defence to show why he should not be so reported (*ibid.* s. 38 (1)). As to service of such notice, *ibid.* s. 62 (2).

*Appeal.*—An appeal lies against the report of Election Commissioners to the next Court of oyer and terminer or gaol delivery in the county or place in which the corrupt or illegal practice is alleged to have been committed, or the Lord Chancellor may direct such appeal to be heard by the judges for the time being on the rota for election petitions, in which case one of such judges is to proceed to the county or place where the offences are alleged to have been committed, and there hear and determine the appeal. See *ibid.* s. 38 (2)–(4).

*Consequences of Report.*—Every person who is reported by Election Commissioners to have been guilty of any corrupt or illegal practice at an election, whether he obtained a certificate of indemnity or not, is subject to the same incapacity as if he had at the date of such election been convicted of the offence of which he is reported guilty. The report will not, however, avoid the election of any candidate who has been declared by an Election Court on the trial of a petition to have been duly elected at such election, nor will it render him incapable of sitting in the House of Commons during the Parliament for which he was elected (*ibid.* s. 38 (5)). As to the incapacities resulting from conviction for corrupt or illegal practices, see CORRUPT PRACTICES; ILLEGAL PRACTICES. Such incapacities will only attach to any person where the report expressly finds that he has been guilty of a corrupt or illegal practice; it is not enough that facts are stated in the report from which such offences might be inferred (see *Grant v. Overseers of Pagham*, 1877, 3 C. P. D. 80).

Moreover, in consequence of the reports of Election Commissioners as to the extensive prevalence of corrupt practices in certain boroughs, such constituencies have in some cases been expressly disfranchised by statute, and the voters reported guilty of corrupt practices have been disfranchised or subjected to incapacities in respect of voting (see, for example, the Representation of the People Act, 1867, 30 & 31 Vict. c. 102, ss. 12–16; 33 & 34 Vict. c. 21; 33 & 34 Vict. c. 25; and the Redistribution of Seats Act, 1885, 48 & 49 Vict. c. 23, ss. 3 and 28).

*Expenses of Election Commissioners.*—As to expenses of Election Commissioners, see the Election Commissioners Expenses Acts, 1869 and 1871, 32 & 33 Vict. c. 21, and 34 & 35 Vict. c. 61: see also Corrupt and Illegal Practices Prevention Act, 1883, s. 58.

## Election Expenses.

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*History.*—The incurring of excessive expenses in connection with parliamentary elections has always been deemed contrary to law, as violating the fundamental principle of the freedom of elections, and consequently subversive of the constitution of Parliament (see the preamble of the Treating Act, 1696, 7 & 8 Will. III. c. 4).

The reduction, regulation, and control of expenditure by candidates at elections has long engaged the attention of the Legislature, and to this end various legislative efforts have been directed. Thus in 1854 an Election Auditor, to be appointed by the candidate, was intrusted with the auditing and publication of accounts of payments made in respect of the election (see Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102). This proving to be an ineffectual means of control, in 1863 the appointment of an Expenses Agent, through whom all payments in respect of election expenses were to be made, was provided for by the Corrupt Practices Act, 1863, 26 & 27 Vict. c. 29. Finally, in 1883, this officer was superseded by the statutory creation of an officer termed the Election Agent, who was fixed with responsibility for the management and conduct of the election, and charged with stringent duties in connection with the incurring, payment, and return of election expenses (see the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, ss. 24–35; see also ELECTION AGENT; as to his duties with regard to election expenses, see *post*).•

*What are Election Expenses.*—Any expenses incurred “on account of or in respect of the conduct or management of an election” are election expenses (see the Corrupt and Illegal Practices Prevention Act, 1883, s. 27 (2) and s. 28 (1)). With regard to illegal expenditure, the Act prohibits the making of certain payments “for the purpose of promoting or procuring the election of a candidate” (see *ibid.* s. 7 (1) and s. 16 (1); see also *post*, under the head *Illegal Expenses*).

No contract whereby any expenses are incurred on account of or in respect of the conduct or management of an election is enforceable against a candidate unless made by the candidate or by his Election Agent either by himself or by his sub-agent (*ibid.* s. 27 (2)).

Whether any particular item of expenditure was incurred on account of or in respect of the conduct or management of the election must depend upon and be determined by the circumstances of each case (see, for example, the judgments in *Elgin and Nairn*, 1895, 5 O.M. & H. 12).

Expenses connected with the registration of voters have been held not to be election expenses (see *Kennington*, 1886, 4 O.M. & H. 93; *Hexham*, 1892, Day’s El. Cas. 91; *Elgin and Nairn*, 1895, 5 O.M. & H. 9; *Shoreditch*, 1896, *ibid.* 71). But election work must not be done under the guise of registration work (see *Stepney*, 1892, Day’s El. Cas. 118). The expenses of associations incurred for the purposes of the association are not election expenses, although the candidate may indirectly be benefited (*ibid.*; see also *Walsall*, 1892, *ibid.* 107). In a recent case certain meetings held before the election for the purpose of ascertaining the opinion of the constituency

and the extent of the opposition, were held not to be chargeable as expenses in the conduct and management of the election (*Lichfield*, 1895, 5 O'M. & H. 35; see also *Lancaster*, 1896, *ibid.* 44). And the expense of giving political lectures for the education of a constituency is not at all necessarily an expense on account of the election. Nor are political lectures, even though given with the view of advancing the prospects of a particular candidate, necessarily election expenses; that must depend upon the circumstances in each case (see *Shoreditch*, 1896, 5 O'M. & H. 70).

The expense of holding meetings for selecting a candidate cannot properly be said to be expenses incurred in procuring the election, although indirectly they may promote the interests of the party. If the primary, direct, and real object is to get a candidate, the expenses incurred in so doing are not within the Act. If, however, the nominal object is to get a candidate, but the real object is to promote the election of the individual candidate, they would be election expenses within the Act (see *Norwich*, 1886, 4 O'M. & H. 84; but see *Stepney*, 1886, *ibid.* 38).

*Commencement of Liability.*—The determination of the period at which a candidate's liability for election expenses commences is a question of considerable nicety and importance, and one that has figured prominently in recent cases.

The Legislature have refrained from giving any definition of what is meant by the "conduct and management of an election," or from fixing any time at which expenditure under this head shall be held to begin (see per Lord McLaren, *Elgin and Nairn*, 1895, 5 O'M. & H. 4). It is, however, now settled that a person may become a candidate before the dissolution, vacancy, or issue of the writ, for the purpose of incurring liability for election expenses. But the period of liability must be confined within reasonable limits, which must necessarily be determined by the facts of each case. As soon, in fact, as an individual comes before a constituency with a view to being elected at the next election, and begins to take measures to promote his election, so soon does his liability commence (see *Walsall*, 1892, 4 O'M. & H. 125; *Rochester*, 1892, *ibid.* 159; *Stepney*, 1892, Day's El. Cas. 117; *Lichfield*, 1895, 5 O'M. & H. 36; see also CANDIDATE). See further as to commencement of candidature with regard to the liability for election expenses, the judgments in *Elgin and Nairn*, 1895, 5 O'M. & H. 2; *Lichfield*, 1895, *ibid.* 34; *Lancaster*, 1896, *ibid.* 44; *Shoreditch*, 1896, *ibid.* 69.

*Expenses before Appointment of Election Agent.*—Where, as is frequently the case, election expenses are incurred before the appointment of the Election Agent, the payments in respect of the same must nevertheless be made by him. There is nothing in the Act which forbids a candidate to incur expenses even before the issue of the writ, but if such expenses are incurred they must be paid by the Election Agent, who is responsible for the proper return of all election expenses (see *Rochester*, 1892, 4 O'M. & H. 159; see also *Ipswich*, 1886, *ibid.* 73).

*Maximum Expenditure.*—No sum may be paid and no expense incurred by a candidate or his election agent, whether before, during, or after an election, on account of or in respect of the conduct or management of the election, in excess of any maximum specified in Sched. I. of the Corrupt and Illegal Practices Prevention Act, 1883 (see *ibid.* s. 8). In a borough the maximum amount of expenses (other than personal expenses and the returning officer's charges) where the number of electors on the register does not exceed 2000 is £350, and where the number of electors exceeds 2000 the maximum is £380, and an additional £30 for every complete 1000 electors above 2000. In a county where the number of electors

does not exceed 2000 the maximum is £650, and where the number exceeds 2000 the maximum is £710, and an additional £60 for every complete 1000 electors above 2000. In Ireland the amounts are different (*ibid.* Sched. I. Part IV.).

In the case of a joint candidature the maximum amount of expenses is reduced (see *ibid.* Sched. I. Part V. (3) and (4); see also CANDIDATE).

*Legal Expenses.*—The expenses that may legally be incurred by candidates at parliamentary elections are set forth in Sched. I. of the Act of 1883.

These include the remuneration of the persons whom the Act allows to be employed for payment, namely, the Election Agent, in counties one sub-agent within each polling station, one polling agent in each polling station, and certain clerks and messengers varying in counties and boroughs according to the number of the electors. The employment of any person for payment in connection with the election, for any purpose or in any capacity otherwise than is authorised by the Act, is an illegal employment (see *ibid.* s. 17, and Sched. I. Part I.; see also ILLEGAL PRACTICES).

In addition to the expenses incurred in the employment of persons legally employed for payment, the following are legal expenses:—

(1) Sums paid to the returning officer for his charges, not exceeding the amount authorised by the Parliamentary Elections (Returning Officers) Act, 1875, 38 & 39 Vict. c. 84;

(2) The personal expenses of the candidate;

(3) The expenses of printing and advertising, and the expenses of publishing, issuing, and distributing addresses and notices;

(4) The expenses of stationery, messages, postage, and telegrams;

(5) The expenses of holding public meetings;

(6) In a borough the expenses of one or more committee rooms, according to the number of electors;

(7) In a county the expenses of a central committee room, and one or more committee rooms for each polling district, according to the number of electors. See *ibid.* Sched. I. Part II.

Expenses in respect of miscellaneous matters, other than those above mentioned, not exceeding in the whole the maximum amount of £200, provided that such expenses are incurred in respect of matters which do not infringe any statute (*ibid.* Sched. I. Part III.); and, in certain cases, payments for the conveyance of voters by sea, which may be in addition to the maximum amount of expenses allowed by the Act (see *ibid.* s. 48), are also legal expenses.

*Illegal Expenses.*—The following are expressly prohibited, and payments in respect of them are illegal:—

(1) The conveyance of electors to and from the poll (*ibid.* s. 7 (1) (a)); see, however, *ibid.* s. 48, as to conveyance of electors by sea in certain cases);

(2) Payments to electors, other than advertising agents, on account of the exhibition of addresses, bills, or notices (*ibid.* s. 7 (1) (b));

(3) Payments to corruptly induce or procure any person to withdraw from being a candidate at an election (*ibid.* s. 15);

(4) Payments on account of bands of music, torches, flags, banners, cockades, ribbons, or other marks of distinction (*ibid.* s. 16 (1));

(5) The hire of committee rooms in licensed premises or public elementary schools (*ibid.* s. 20);

(6) Any payment in excess of the maximum allowed by the Act (*ibid.* s. 8 (1)), or for any purpose not authorised by the Act (*ibid.* s. 17 (1)), or

knowingly providing money for any such purpose, or to replace any money so expended (*ibid.* s. 13). And any payments of election expenses (except such as are allowed by sec. 31) made otherwise than by the Election Agent (*ibid.* s. 28; see ILLEGAL PRACTICES).

*Payment of Election Expenses.*—All the election expenses, with the exception of the personal expenses of the candidate and certain petty expenses, must be paid by the Election Agent.

No payment and no advance or deposit is to be made by a candidate, or by any agent on his behalf, or by any other person at any time, whether before, during, or after the election, in respect of any expenses incurred on account of or in respect of the conduct or management of the election, otherwise than by or through the Election Agent of such candidate, whether acting in person or by a sub-agent; and all money provided by any person other than the candidate for any expenses incurred on account of or in respect of the conduct or management of the election, whether as gift, loan, advance, or deposit, must be paid to the candidate or his Election Agent, and not otherwise. This does not, however, apply to a tender of security to, or any payment by, the returning officer, or to any sum disbursed by any person out of his own money for any small expense legally incurred by himself, if such sum is not repaid to him (Corrupt and Illegal Practices Prevention Act, 1883, s. 28 (1)). A person making any payment, advance, or deposit in contravention of this section, or paying in contravention of this section any money so provided, is guilty of an illegal practice (*ibid.* s. 28 (2); see also ILLEGAL PRACTICES).

Every payment made by an Election Agent, whether by himself or by a sub-agent, in respect of any election expenses, must, except where less than forty shillings, be vouched for by a bill stating the particulars, and by a receipt (*ibid.* s. 29 (1)).

Claims against a candidate or his Election Agent in respect of election expenses must be sent in to the Election Agent within fourteen days after the day on which the candidates returned are declared elected, otherwise such claims are barred and must not be paid (*ibid.* s. 29 (2) and (3)), unless on application to the Court by the claimant, or by the candidate, or his Election Agent, leave to pay the same be obtained (*ibid.* s. 29 (9)).

All election expenses must be paid within twenty-eight days after the day on which the candidates returned are declared elected (*ibid.* s. 29 (4) and (5)).

If the Election Agent disputes a claim, or refuses or fails to pay it within the twenty-eight days, it is deemed to be a disputed claim, and the claimant may, if he thinks fit, sue for it in any competent Court, and any sum paid by the candidate or his agent in pursuance of the judgment or order of such Court is deemed to be paid within the time limited by the Act, and to be an exception from the provisions of the Act requiring claims to be paid by the Election Agent (*ibid.* s. 29 (8)). As to the taxation of disputed claims in respect of election expenses, see *ibid.* s. 30. As to claims by the Election Agent for his remuneration, see *ibid.* s. 32 (1); see also ELECTION AGENT.

*Personal Expenses of Candidate.*—The candidate may himself pay any personal expenses incurred by him on account of or in connection with or incidental to the election to an amount not exceeding one hundred pounds, but any further personal expenses so incurred by him must be paid by his Election Agent (*ibid.* s. 31 (1)). The candidate must send to the Election Agent, within the time limited by the Act for sending in claims, a written statement of the amount of personal expenses so paid by him (*ibid.* s. 31 (2)).

A candidate's personal expenses include his reasonable travelling expenses, and the reasonable expenses of his living at hotels or elsewhere for the purposes of, and in relation to, the election (see *ibid.* s. 64).

*Petty Expenses.*—Any person may, if so authorised in writing by the Election Agent, pay any necessary expenses for stationery, postage, telegrams, and other petty expenses, to a total amount not exceeding that named in the authority, but any excess above that amount must be paid by the Election Agent (*ibid.* s. 31 (4)). A statement of the particulars of payments made by any person so authorised must be sent to the Election Agent within the time limited by the Act for the sending in of claims (*i.e.* fourteen days from the election), and must be vouched for by a bill containing the receipt of that person (*ibid.* s. 31 (4)).

*Return and Declaration of Election Expenses.*—The Election Agent of every candidate at the election must, within thirty-five days after the day on which the candidates returned are declared elected, transmit to the returning officer a true return of the election expenses of that candidate (*ibid.* s. 33 (1)). Such return must contain statements of all payments made by the Election Agent, with all the bills and receipts; of the amount of personal expenses paid by the candidate; of sums paid to the returning officer for his charges; of all disputed claims; of all unpaid claims in respect of which application has been or is about to be made to the Court; and of all money, etc., received by the Election Agent from the candidate or any other person for election expenses (*ibid.*); or, when the candidate is his own Election Agent, a statement of all money paid by him (*ibid.* s. 33 (3)). For form of return of election expenses, see *ibid.* Sched. II.

The return must be accompanied by a declaration made by the Election Agent before a justice of the peace (*ibid.* s. 33 (2)). For form of declaration respecting election expenses, see *ibid.* Sched. II.

The candidate must, at the time that the Election Agent transmits the return, or within seven days afterwards, transmit to the returning officer a declaration respecting election expenses (*ibid.* s. 33 (4)); for form of declaration, see *ibid.* Sched. II.).

As to the consequences of a candidate or Election Agent knowingly making a false declaration, see CORRUPT PRACTICES.

If without some authorised excuse a candidate or an Election Agent fails to comply with the requirements of the Act as to the return and declaration respecting election expenses, he is guilty of an illegal practice (see *ibid.* s. 33 (6)). As to what is an authorised excuse for non-compliance with such provisions, and as to the granting of relief by the Court in such case, see *ibid.* s. 34.

The returning officer, within ten days after receiving the return respecting election expenses, must publish a summary of it in at least two newspapers circulating in the county or borough for which the election was held, accompanied by a notice of the time and place at which the return and declarations can be inspected. The return and declarations must be kept by the returning officer for two years, and are open to inspection by any person on payment of a fee of one shilling (*ibid.* s. 35).

*Municipal and other Elections.*—Expenditure at municipal elections was first placed under statutory regulation by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 & 48 Vict. c. 70. That Act contains provisions with respect to expenses at municipal elections which in many respects are similar to those relating to parliamentary elections. There is, however, no provision for the appointment of a paid Election Agent at municipal elections. At such elections, therefore, all duties with regard to

the payment and return of election expenses rest directly with the candidate, who is responsible for the same. The candidate at an election of councillors is, in fact, generally his own Election Agent; but he may obtain the assistance of an unpaid agent; the employment for payment of any persons for election purposes, except certain clerks and messengers, and one polling agent in each polling station, would be an illegal employment (see *ibid.* s. 13). It is most important to observe that, except in the City of London, election expenses may legally be incurred by or on behalf of any candidate only in the case of an election for the office of councillor (see *ibid.* s. 5). As to the maximum expenditure, see *ibid.*

The Act of 1884 applies to municipal elections in the City of London, subject to certain exceptions (*ibid.* s. 35). See also as to municipal elections in the City of London, the City of London Ballot Act, 1887, 50 Vict. c. xiii. s. 11.

The provisions of the Act of 1884 as to the prohibition of the payment of any sum and the incurring of election expenses do not apply to elections of members of School Boards, Local Boards, Improvement Commissioners, or Poor Law Guardians (*ibid.* s. 37, and Sched. I.).

The expenses of School Board elections are provided for by the Elementary Education Act, 1870, 33 & 34 Vict. c. 75, Sched. II. Part I. r. 2, and Part III. r. 4. See also the Regulations for the Election of School Boards published from time to time.

The provisions of the Act of 1884 with regard to election expenses at municipal elections are, with the necessary modifications, applied to County Council elections by the Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 75.

The same provisions, also, subject to adaptations, alterations, and exceptions, are applied to Parish and District Council elections, etc., by the Local Government Act, 1894, 56 & 57 Vict. c. 73, s. 48 (3). At these elections there is no limit, as at municipal elections, to a candidate's expenses, and no limit of time within which claims for election expenses are to be sent in or paid, nor has any return or declaration of expenses to be made. See the Election Orders framed under the Act and published from time to time.

## Election Petition.

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## I. PARLIAMENTARY.

**HISTORICAL INTRODUCTION.**—*Former Modes of Trial of Election Petitions.*  
 —The right of determining the validity of elections was in the earliest times of parliamentary history apparently exercised by the king, assisted by the Lords or by the judges (see Prynne, *Register of Parliamentary Writs*, Pt. II. pp. 118, 119, 122; *ibid.* Pt. IV. p. 259; Rot. Parl. vol. iii. p. 530). By a statute of 1410 (11 Hen. iv. c. 1; see *Statutes of the Realm*, vol. ii. p. 162) the judges of assize were empowered to inquire into undue returns. The first assertion of jurisdiction by the House of Commons was probably in 1586 (see Stubbs, *Const. Hist.* vol. iii. p. 423; Hallam, *Const. Hist.*, 3rd ed., vol. i. p. 374). But the right of determining the validity of elections, and of deciding all questions as to disputed elections, has undoubtedly been exercised by the House of Commons, at any rate since the decision in the case of *Goodwin and Fortescue* in 1604 (*Parliamentary Hist.* vol. i. p. 998).

The trial by the Commons of disputed returns was at first before a Committee of Privileges and Elections nominated by the House; but after 1672 it took place before a Committee of the whole House, the trial of an election petition being then virtually decided by a party division. In 1770 Grenville's Act (10 Geo. iii. c. 16) provided for the trial of controverted elections by a Select Committee; the number of the Committee was reduced and the mode of its appointment altered in 1839 by Sir Robert Peel's Act (4 & 5 Vict. c. 58), and again in 1848 by 11 & 12 Vict. c. 98.

**Modern Practice.**—The Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), transferred the trial of election petitions to the judges of the Common Law Courts for the time being upon the rota of election judges. Under that Act the trial was to be before one judge of the Court of Common Pleas (s. 11), but now under the Parliamentary Elections and Corrupt Practices Act, 1879 (42 & 43 Vict. c. 75, s. 2), the trial of an election petition must be before two judges, and by the Judicature Act, 1881 (44 & 45 Vict. c. 68, s. 13), the judges to be placed on the rota for the trial of election petitions under the provisions of the Parliamentary Elections Act, 1868, are to be selected from the judges of the Queen's Bench Division of the High Court of Justice.

Though the trial of a petition relating to any controverted return now, therefore, takes place before two judges of the Queen's Bench Division for the time being upon the rota of election judges, the House of Commons nevertheless still retains the right of deciding as to the existence of legal disqualifications in persons returned as members, and of declaring any seat to be vacant in consequence of such disqualification; and there are several instances of the exercise of this right in recent times (see *May, Parliamentary Practice*, 10th ed., p. 618; *Rogers on Elections*, 17th ed., vol. ii. p. 177). This right of the House of Commons to resolve that a seat is vacant is expressly recognised by the Parliamentary Elections Act, 1868 (see s. 38 (3)). With this exception, however, no election or return to Parliament can now be questioned except in accordance with the provisions of that Act (see *ibid.* s. 50).

The law and practice relating to election petitions now rests upon that Act, as modified and amended by subsequent legislation, and the Parliamentary Election Petition Rules made thereunder. The judges on the election rota were by sec. 25 of that Act empowered to make rules for the regulation of the practice, procedure, and costs of election petitions, and the trial thereof, and the certifying and reporting thereon. This power is now, however, transferred to the Rule Committee of the judges (see *Corrupt and Illegal Practices Prevention Act*, 1883, s. 56 (2)). The practice relating to election petitions, so far as such rules do not extend, is to be regulated, so far as may be, by the principles, practice, and rules on which the committees of the House of Commons previously acted in dealing with election petitions (see s. 26 of the Act of 1868).

A Select Committee of the House of Commons was appointed in 1897 to inquire into the procedure and practice on parliamentary election petitions, and to report to the House if any changes were desirable therein. Having regard to the evidence given before the Committee, it is probable that some changes will shortly be made in the Parliamentary Election Petition Rules with regard to the form of the petition, particulars, etc. Legislation on the question of security for costs is also in contemplation.

**THE PETITION.**—*Grounds of Petition.*—Any matters which would, if proved, avoid the election or the return will afford ground for the presentation of an election petition. Thus the commission by a candidate or his agents of any corrupt or illegal practices, the existence of any disqualification in the candidate elected, or the fact that the majority of votes were in favour of the petitioner, are grounds for petitioning. So also the existence in the constituency of general corruption by means of bribery, or treating, or of general intimidation by rioting, violence, or undue spiritual influence (see **CORRUPT PRACTICES**; **ILLEGAL PRACTICES**).

An election petition may be presented on the ground that a double return has been made (see s. 40 of the Act of 1868), or that no return has been made (*ibid.* s. 52).

Violations of the provisions of the Ballot Act, 1872 (see **BALLOT**), have been the grounds for petitioning in some cases (see *Worcester*, 1880, 3 O.M. & H. 184; *East Clare*, 1892, Day's El. Cas. 161; *Davies v. Lord Kensington*, 1874, L. R. 9 C. P. 720; see, however, sec. 13 of the Ballot Act, 1872, and *Woodward v. Sarsons*, 1875, L. R. 10 C. P. 733). A petition asking for a recount may also be presented on the ground that the ballot papers have been miscounted (see *Renfrew*, 1874, 2 O.M. & H. 213; *Halifax*, 1893, 4 O.M. & H. 203; *Shoreditch*, 1896, 5 O.M. & H. 68; *Tower Hamlets*, 1896, *ibid.* 89; see also **RECOUNT**).

*Petitioners.*—An election petition, *i.e.* a petition complaining of an undue return or undue election of a member to serve in Parliament for a county or borough, may be presented by any one or more of the following persons: (1) Some person who voted, or who had a right to vote, at the election to which the petition relates (see *Walsall*, 1892, Day's El. Cas. 1); or (2) some person claiming to have had a right to be returned or elected at such election; or (3) some person alleging himself to have been a candidate at such election (see s. 5 of the Act of 1868).

Any application to stay the proceedings or dismiss a petition on the ground that any petitioner is not duly qualified, must be by a substantive motion, so that the petitioner may have an opportunity of being heard (see *Stepney*, 1892, Day's El. Cas. 10); the onus of proving that a petitioner is not qualified is upon the respondent (*Walsall*, 1892, *ibid.* 2).

As to the substitution of petitioners on the abatement or withdrawal of a petition, see *post* under the heads *Abatement of Petition*, *Withdrawal of Petition*.

*Respondents.*—As a rule, the respondent is the person whose election is disputed. A petition may even be presented after the death of the member whose election is complained of (*Tipperary*, 1875, 3 O'M. & H. 21). Two or more candidates may be made respondents to the same petition, and their case may, for the sake of convenience, be tried at the same time, but such petition is to be deemed to be a separate petition against each respondent (s. 22 of the Act of 1868). It is not, however, necessary to make all the successful candidates respondents, for a petition may be presented against some only of the persons returned at the election, although the ground of the petition is one affecting the validity of the election as a whole (see *Line v. Warren*, 1885, 14 Q. B. D. 548). A candidate who is unsuccessful at an election cannot be made a respondent against his will or without his consent (see *Lovering v. Dawson*, 1875, L. R. 10 C. P. 711; see, however, *Yates v. Leach*, 1874, L. R. 9 C. P. 605). Where an election petition claims the seat for one of the defeated candidates, and on the trial of the petition it is decided that he was duly elected, a petition against his return cannot subsequently be presented (see *Waygood v. James*, 1869, L. R. 4 C. P. 361).

The returning officer may in some cases be made a respondent. The Act of 1868 provides that where an election petition complains of the conduct of a returning officer, he is, for all the purposes of the Act, except the admission of respondents in his place, to be deemed to be a respondent (s. 51). But a returning officer will not, it seems, be deemed a respondent unless some wilful misconduct is charged against him (see per Cave, J., *Cirencester*, 1893, Day's El. Cas. 3; see also *Harmon v. Park*, 1880, 6 Q. B. D. at p. 328). The proper course in such case would be for the petitioner to make the returning officer a party (see *Halifax*, 1893, Day's El. Cas. 21). The returning officer should be made a respondent if it is intended to adduce evidence connecting him with corrupt practices (see *Tamworth*, 1869, 1 O'M. & H. 77).

If before the trial of the petition the respondent dies or is summoned to Parliament as a peer, or if the House of Commons have resolved that his seat is vacant, or if he gives proper notice to the Court that he does not intend to oppose the petition, notice of such event having taken place is to be given in the county or borough to which the petition relates, and within ten days after such notice is given, or such further time as the Court may allow, any person who might have been a petitioner at the election to which the petition relates may apply to the Court to be admitted as a respondent

to oppose the petition, and such person is on application to be admitted accordingly, either with the respondent, if there be one, or in the place of the respondent; any number of persons, not exceeding three, may be so admitted (s. 38 of the Act of 1868, and Rules 51 and 54). As to the manner and time of the respondent's giving notice that he does not intend to oppose, see Rules 52 and 53. A respondent who has given notice that he does not intend to oppose the petition is not allowed to appear or act as a party against such petition, and may not sit or vote in the House of Commons until the Court has reported to the House (s. 39).

*Time for Petitioning.*—The petition must be presented within twenty-one days after the return of the member to whose election the petition relates, unless it questions the return or election upon an allegation of corrupt practices, and specifically alleges a payment of money or other reward to have been made by any member or on his account or with his privity since the time of such return, in pursuance or in furtherance of such corrupt practices, in which case the petition may be presented at any time within twenty-eight days after the date of such payment (*ibid.* s. 6 (2)). The result is that, although a petition complaining of corrupt practices must be presented within twenty-one days after the return, yet if payments are subsequently made then the time of presenting the petition is extended to within twenty-eight days of the last payment to which reference is made in the petition (see *Kidderminster*, 1874, 2 O'M. & H. 172). As to the date of the return, see *Hurdle v. Waring*, 1874, L. R. 9 C. P. 435.

Where the petition questions the return or the election upon an allegation of an illegal practice it may, so far as respects such illegal practice, be presented (1) at any time before the expiration of fourteen days after the day on which the returning officer receives the return and declarations respecting election expenses by the member to whose election the petition relates and his Election Agent; (2) if the petition specifically alleges a payment of money, or some other act, to have been made or done since the said day, by the member or an agent of the member, or with the privity of the member or his Election Agent, in pursuance or in furtherance of the illegal practice alleged in the petition, it may be presented at any time within twenty-eight days after the date of such payment or other act (Corrupt and Illegal Practices Prevention Act, 1883, s. 40 (1)). This applies in the case of an offence relating to the return and declarations respecting election expenses as if it were an illegal practice, and it applies also notwithstanding that the act constituting the alleged illegal practice amounted to a corrupt practice (*ibid.* s. 40 (3)). Where the return and declarations are received on different days, the day on which the last of them is received, and, where there is an authorised excuse for failing to make and transmit the same, the date of the allowance of the excuse is to be substituted for the day on which the same are received by the returning officer (*ibid.* s. 40 (4)).

In reckoning time for the purpose of ascertaining these periods, Sundays, Christmas Day, Good Friday, and any days set apart for a public fast or thanksgiving are excluded (see s. 49 of the Act of 1868; and s. 40 (5) of the Act of 1883; see also *Pease v. Norwood*, 1869, L. R. 4 C. P. 235; *Hurdle v. Waring*, 1874, L. R. 9 C. P. 435).

*Form of Petition.*—An election petition must state the right of the petitioner to petition within sec. 5 of the Act of 1868, and must also state the holding and result of the election, and briefly the facts and grounds relied on to sustain the prayer (Parliamentary Election Petition Rules, Rule 2). The petition must be divided into paragraphs, each of which, as nearly as may be, must be confined to a distinct portion of the subject, and every

paragraph must be numbered consecutively, and no costs are to be allowed of drawing or copying any petition not substantially in compliance with this rule, unless otherwise ordered by the Court (*ibid.* Rule 3). It must conclude with a prayer, as, for instance, that some specified person should be declared duly returned or elected, or that the election should be declared void, or that a return may be enforced, as the case may be (*ibid.* Rule 4). The petition must be signed by the petitioner, or by all the petitioners, if more than one (*ibid.* Rule 4; Parliamentary Elections Act, 1868, s. 6). The petition should be in the form given in Rule 5 of the Parliamentary Election Petition Rules, or to the like effect. Evidence need not be stated in the petition (*ibid.* Rule 6).

*Presentation and Service of Petition.*—The petition must be presented to the Queen's Bench Division of the High Court of Justice in England, and in Ireland to the Common Pleas Division (s. 5 of the Act of 1868, and Judicature Act, 1873, 36 & 37 Vict. c. 66, ss. 32 and 34).

The presentation must be made by leaving the petition at the office of the Master nominated by the Lord Chief Justice of England (s. 6 (3) of the Act of 1868, and Rule 1). The Master or his clerk must, if required, give a receipt (for form of receipt, see Rule 1 of the Parliamentary Election Petition Rules). When the last day for presenting the petition happens to fall on a holiday, the petition may be put into the letter-box at the Master's office at any time during such day, but an affidavit, stating with reasonable precision the time when such delivery was made, must be filed on the first day after the expiration of the holidays (*ibid.* Rule 72).

With the petition must also be left a copy of it (in practice four copies are left), and a writing signed by the petitioners giving the names and addresses of their agents, or stating that they act for themselves, as the case may be; and, in either case, giving an address within three miles from the General Post Office at which notices addressed to them may be left. If no address is left, notices may be given by sticking up the same at the Master's office. The Master must enter the names and addresses so given in a book which is to be open to inspection. Upon presentation of the petition, the Master is required to send a copy of it to the returning officer, with the name of the petitioner's agent and of the respondent's agent, and the address, if any, and the returning officer must publish the same within the county or borough to which the petition relates (*ibid.* Rules 1 and 9-12; and s. 7 of the Act of 1868). An agent employed for the petitioner or respondent must forthwith leave written notice of his appointment at the office of the Master, and service of notices, etc., upon such agents is sufficient for all purposes (Rule 59).

Notice of the presentation of an election petition, and of the nature of the proposed security, accompanied with a copy of the petition, must within five days, exclusive of the day of presentation, be served by the petitioner on the respondent (s. 8 of the Act of 1868, and Rule 13).

*Security for Costs.*—At the time of the presentation of a petition, or within three days afterwards, security must be given on behalf of the petitioner for the payment of all costs, charges, and expenses that may become payable by him to any person summoned as a witness on his behalf, or to the member whose election or return is complained of (*i.e.* the respondent (*ibid.* s. 6 (4))).

The amount of the security required to be given under the Act of 1868 is £1000 (*ibid.* s. 6 (5)). It should, however, here be observed that this amount having in recent parliamentary election petitions been found to be totally inadequate to meet the costs incurred, and the Election Court, at

present, having no power to order further security to be given (see, for example, the judgments in *Tower Hamlets*, 1896), this matter, in particular, was under consideration by the Committee of the House of Commons in 1897, and legislation upon the subject is in contemplation.

The security must be given either by recognisance, to be entered into by any number of sureties not exceeding four, or by a deposit of money by payment into the Bank of England to the account of "The Parliamentary Elections Act, 1868, Security Fund," or partly in one way and partly in the other (*ibid.* s. 6 (5), and Rule 16). As to the mode of entering into recognisances as security for costs, for form of such recognisance, and as to leaving the same at the Master's office, see Rules 18-20.

Notice of the nature of the proposed security must be served by the petitioner on the respondent at the same time as the notice of the presentation of the petition.

Where the security is given wholly or partially by recognisance, the respondent may, within five days from the date of service of the notice of the petition and of the nature of the security, object in writing to such recognisance, on the ground that the sureties or any of them are insufficient (see *Pease v. Norwood*, 1869, L. R. 4 C. P. 235), that a surety is dead or cannot be found or ascertained from the want of a sufficient description in the recognisance, or that a person named in the recognisance has not duly acknowledged the same (s. 8, and Rule 21). Any objection to the security is to be heard and decided by the Master, subject to appeal within five days to a judge, upon summons taken out by either party to declare the security sufficient or insufficient (s. 9, and Rule 23; as to the hearing of the summons, and as to the order thereon, and costs, see Rules 24-29). If an objection to the security be allowed, the petitioner may, within five days, remove the same by a deposit of such a sum of money as may be deemed by the Master or judge to make the security sufficient; such amount must be stated in the order of the Master or judge (Rule 26).

If on objection made the security is decided to be insufficient, and the objection is not removed as above mentioned, no further proceedings can be had on the petition; otherwise, on the expiration of the time limited for making objections, or, after objection made on the sufficiency of the security being established, the petition is deemed to be at issue (s. 9).

In the event of no security being given, the petition would apparently remain upon the file untried; this was the case with three petitions presented in 1892-93 (*South Nottingham, East Nottingham, and Hereford*; see Day's El. Cas. 9).

As to applications to have the deposited security handed over in payment of the respondent's costs after the trial of the petition, see *Stepney*, 1892, 4 O'M. & H. 184; *Lancaster*, 1896, 5 O'M. & H. 52; *Tower Hamlets*, 1896, *ibid.* 117.

INTERLOCUTORY MATTERS.—*Hearing of Interlocutory Applications.*—All interlocutory questions and matters (except as to the sufficiency of the security which is heard by the Master, see *ante*, and as to the withdrawal of the petition which must be before two election judges, see *post*) are to be heard and disposed of before a judge, who is to have the same control over the proceedings in an election petition as a judge at chambers in the ordinary proceedings of the High Court (Rule 44). If practicable, such questions and matters must be heard and disposed of by one of the judges upon the rota, if not, then by any judge at chambers (*ibid.*; see also *Salford*, 1869, 19 L. T. N. S. 502).

A copy of every order, other than an order giving further time for the delivery of particulars or for costs only, must be forthwith filed with the Master by the party obtaining the order, and produced at the trial by the Registrar, stamped with the official seal (Rule 69).

*Amendment of Petition.*—Any election petition presented within the prescribed time may, for the purpose of questioning the return or the election upon an allegation of an illegal practice, be amended with the leave of the High Court within the time within which a petition questioning the return upon an allegation of that illegal practice can be presented (Corrupt and Illegal Practices Act, 1883, s. 40 (2)). This applies to an offence relating to the return and declarations respecting election expenses in like manner as if it were an illegal practice, and it also applies notwithstanding that the act constituting the alleged illegal practice amounted to a corrupt practice (*ibid.* s. 40 (3); see also *Buckrose*, 1886, 4, O'M. & H. 116).

It was clearly the intention of the Legislature that the persons elected should know within a limited time whether or not their election was to be questioned, and also the grounds upon which it was to be questioned (see *Maude v. Lowley*, 1874, L. R. 9 C. P. at p. 174; see also *Lancaster*, 1896, 5 O'M. & H. 41). It follows, therefore, that in the absence of express statutory authority the Court has no jurisdiction to allow a petition to be amended after the time for presenting it has elapsed. Such authority is, to a limited extent, conferred by the Act of 1868, which provides that, subject to the provisions of that Act, the Court (now the Queen's Bench Division) is to have the same powers, jurisdiction, and authority, with reference to an election petition and the proceedings thereon, as it would if such petition were an ordinary cause within their jurisdiction (s. 2); and on the trial of an election petition the judges have the same powers, jurisdiction, and authority as judges of one of the superior Courts and as judges of assize and Nisi Prius (see s. 29).

It has been held under these sections that after the time for presenting the petition has elapsed the Court has no power to allow the petition to be amended so as to introduce new charges, as that would be in effect to allow a new petition to be presented after the expiration of the prescribed time (see *Maude v. Lowley*, 1874, L. R. 9 C. P. 165; *Clark v. Wallond*, 1883, 52 L. J. Q. B. 321; see also *Lancaster*, 1896, 5 O'M. & H. 41; *Shoreditch*, 1896, *ibid.* 69; *Cremier v. Lowles*, [1896] 1 Q. B. 504). And the Court will not amend a petition by striking out, after the lapse of time limited for presenting it, that part of the prayer of the petition which claims the seat for the petitioner, for to do so would affect the rights of the constituency (see *Aldridge v. Hurst*, 1876, 1 C. P. D. 410). But in an earlier case where after the presentation of the petition new facts were discovered upon inspection of the ballot papers, viz. that the returning officer had neglected to insert in the counterfoils of the ballot papers of certain voters their numbers on the Burgess roll, and that certain "tendered ballot papers" (see *BALLOT*) were used as ballot papers, put into the ballot-box and counted, the Court allowed the amendment of the petition so as to include those facts, the points intended to be raised being of serious importance and such as might affect the result of the election (*Pickering v. Startin*, 1873, 28 L. T. 111). It has also been held that it is competent to the Court to amend a petition at any time by striking out allegations therein, where the Court is satisfied that no injurious result will follow, or by adding, before the time of presenting the petition has elapsed, matters discovered after the filing of the petition (*Aldridge v. Hurst*, 1876, *supra*; amendments were so made in *Walsall* and *Manchester*, 1892, Day's El. Cas. 7).

Application for leave to amend an election petition should be made by summons, supported by affidavit, before a judge on the rota of election judges. Leave to amend will not be granted upon an *ex parte* application made to a judge who is not on the rota (see *Shaw v. Reckitt (Pontefract)*, [1893] 1 Q. B. 779; see also [1893] 2 Q. B. 59).

*Particulars.*—Such particulars may be ordered by a judge as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial, in the same way as in ordinary proceedings in the Queen's Bench Division, and upon such terms as to costs and otherwise as may be ordered (Rule 6). Thus where the petition contains general allegations of corrupt and illegal practices, *e.g.* where "other corrupt and illegal practices" are alleged, the respondent is entitled to particulars of the charges so as to ascertain what he has to meet (see, for example, *Lancaster*, 1896, 5 O'M. & H. 39; *Shoreditch*, 1896, *ibid.* 68). Moreover, where the petition contains specific allegations of corrupt practices, full particulars of the names and addresses of the persons affected, and of the times and places of the commission of the acts, of the nature and character of the acts, and of the numbers, if any, on the register of the persons affected by the acts, will be ordered (see *Bradford*, 1869, 1 O'M. & H. 38; *Bodmin*, 1869, *ibid.* 117; *King's Lynn*, 1869, *ibid.* 207; *Harwich*, 1880, 3 O'M. & H. 61; *Walsall*, 1892, Day's El. Cas. 11; *Worcester*, 1892, *ibid.*; *Stepney*, 1892, *ibid.*; *Rochester*, 1892, *ibid.*; *Cirencester*, 1893, *ibid.*; *Pontefract*, 1893, *ibid.*; similar particulars were also ordered in the petitions of 1895–96). In the case of allegations of illegal practices similar particulars will be ordered; but the order for particulars must necessarily vary with the circumstances of each case; where, for instance, general corruption is alleged less stringent particulars will be ordered (see *Beverley*, 1869, 1 O'M. & H. 143; *Taunton*, 1874, 2 O'M. & H. 70; *Wigan*, 1881, 4 O'M. & H. 1; *Belfast*, 1886, *ibid.* 106; *Worcester*, 1892, Day's El. Cas. 12; *Hexham*, 1892, *ibid.*; *Walsall*, 1892, *ibid.*; *Pontefract*, 1893, *ibid.*).

With regard to the time for the delivery of particulars, particulars of general allegations have in recent cases been ordered to be delivered within a time varying from five to ten days (usually seven days) from the date of the order (see Day's El. Cas. 11; *Lancaster*, 1896, 5 O'M. & H. 39; *Shoreditch*, 1896, *ibid.* 68). The particulars of specific allegations in the petition have in recent practice frequently been ordered to be delivered seven or ten days before the day of trial; but in some cases the order for particulars has made the time for delivery depend upon the number of charges in the particulars (see *Cirencester*, 1893, Day's El. Cas. 13; this practice was followed in several of the petitions of 1895–96). There is, indeed, no inflexible rule as to the period before the day appointed for the trial at which particulars must be delivered; the time to be fixed for delivery must depend upon the circumstances of each case (see *Rushmere v. Isaacson (Stepney)*, [1893] 1 Q. B. 118).

When complying with the order for particulars, the petitioner should be most careful only to make such charges as he has a reasonable expectation of being able to prove at the trial (see *Pontefract*, 1893, 4 O'M. & H. 202). The reckless making of voluminous charges in the particulars in support of which no evidence can be adduced at the trial is always most severely commented upon by the judges (see *Norwich*, 1886, 4 O'M. & H. 91; *Worcester*, 1892, Day's El. Cas. 88; *Montgomery*, 1892, *ibid.* 152; *East Manchester*, 1892, *ibid.* 153; *Pontefract*, 1893, 4 O'M. & H. 202; *Lancaster*, 1896, 5 O'M. & H. 42; *Tower Hamlets*, 1896); and the petitioner, even if successful, is frequently disallowed the costs of such charges, or even ordered



to pay the respondent's costs in respect of them (see *Hereford*, 1869, 1 O'M. & H. 197; *Blackburn*, 1869, *ibid.* 205; *Youghal*, 1869, *ibid.* 298; *Norwich*, 1871, 2 O'M. & H. 42; *Carrickfergus*, 1880, 3 O'M. & H. 93; *Norwich*, 1886, 4 O'M. & H. 91; *Rochester*, 1892, 4 O'M. & H. 161; *Walsall*, 1892, Day's El. Cas. 111; *South Meath*, 1892, *ibid.* 140; *North Meath*, 1892, 4 O'M. & H. 193; *Pontefract*, 1893, *ibid.* 201; *Southampton*, 1895, 5 O'M. & H. 24).

Full particulars must be given according to the terms of the order, otherwise an order for further and better particulars may be obtained; such an order was made in *Montgomery*, 1892, Day's El. Cas. 15; *Manchester*, 1892, *ibid.*; *Hexham*, 1892, *ibid.*; and in several of the petitions of 1895-96.

A petitioner cannot extend his petition by making charges in his particulars which are not covered by the petition; such particulars would be ordered to be struck out (this was done in *Montgomery*, 1892; *Lancaster*, 1896; *Shoreditch*, 1896; see also *Cremier v. Lowles*, [1896] 1 Q. B. 504).

Leave to amend the particulars so as to include further charges may be obtained where such charges have only been discovered since the delivery of the particulars, provided that they come within the petition (see *Carrickfergus*, 1869, 1 O'M. & H. 264; *Bodmin*, 1869, *ibid.* 118; *Longford*, 1870, 2 O'M. & H. 8; *Walsall*, 1892, Day's El. Cas. 15; *Pontefract*, 1893, *ibid.*). Such application must be supported by affidavit, and is sometimes adjourned to the trial (see *Worcester*, 1892, *ibid.*). Application may be made at the trial for the amendment of particulars (see *East Manchester*, 1892, *ibid.* 154; *Pontefract*, 1893, *ibid.* 15). As to amendment in case of a mistake in the particulars, see *Harwich*, 1880, 3 O'M. & H. 61; see also *Tower Hamlets*, 1896, 5 O'M. & H. 90.

As to particulars on a scrutiny, see *post*, *Scrutiny*; and as to particulars of recriminatory evidence, see *post*, *Recriminatory Case*.

*Inspection of Ballot Papers, etc.*—Rejected ballot papers in the custody of the Clerk of the Crown in Chancery can only be inspected by order of the House of Commons or of the High Court granted on the Court being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose of a prosecution for an offence in relation to the ballot papers (see *BALLOT*), or for the purpose of an election petition (Ballot Act, 1872, 35 & 36 Vict. c. 33, Sched. I, Rule 40). The order may be obtained from a judge at chambers (*ibid.*). The counterfoils of the ballot papers and counted ballot papers also can only be inspected by order, and care must be taken on making and carrying into effect any such order that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted, and his vote has been declared to be invalid (*ibid.* Rule 41). Such orders may be made subject to such conditions as to persons, time, place, and mode of inspection as may be deemed expedient (*ibid.* Rules 40 and 41; see also *Tyrone*, 1873, 7 Ir. R. C. L. 190; *Stowe v. Jolliffe*, 1874, L. R. 9 C. P. 446). The return, declarations, and other documents sent by the Election Agent to the returning officer are, however, open to public inspection, and copies may be obtained upon payment of fees (see Ballot Act, 1872, Rule 42; and *Corrupt and Illegal Practices Prevention Act*, 1883, s. 35 (2)).

*Recount.*—Where it is alleged that the ballot papers have been miscounted, an order may be obtained for a recount before the trial of the petition. The application for an order for a recount is by summons before an election judge, supported by affidavits. The order for a recount has been frequently applied for and obtained in recent petitions. As to the procedure on a recount, see *RECOUNT*.

*Withdrawal of Petition.*—After an election petition has been presented it cannot be withdrawn without the leave of two election judges upon special application (s. 35 of the Act of 1868; Parliamentary Elections and Corrupt Practices Act, 1879, 42 & 43 Vict. c. 75, s. 2; see also *North Durham*, 1874, 4 O'M. & H. 2; *Brecon*, 1870, 2 O'M. & H. 33). No application can be made for the withdrawal of a petition until notice has been given in the county or borough to which the petition relates of the intention of the petitioner to make an application for the withdrawal of his petition (s. 35 of the Act of 1868). The notice must be in writing and signed by the petitioners or their agent, and must state the ground on which the application is intended to be supported. It must be left at the Master's office, and a copy of it must be given by the petitioner to the respondent, and to the returning officer, who must make it public in the county or borough to which it relates, and it must be forthwith published by the petitioner in at least one newspaper circulating in the place (Rules 45-47).

On the hearing of the application for withdrawal, any person who might have been a petitioner in respect of the election to which the petition relates may apply to the Court to be substituted as a petitioner for the petitioner so desirous of withdrawing the petition (s. 35 of the Act of 1868). Notice in writing of intention to make such application should be given to the Master, but the want of such notice will not defeat the application if in fact made at the hearing (Rule 48). The time and place for hearing the application is to be fixed by a judge, and the hearing is not to be less than a week after the notice of the intention to apply has been given to the Master. Notice of the time and place appointed for the hearing is to be given to such persons, if any, as have given notice to the Master of an intention to apply to be substituted as petitioners, and otherwise in such manner and such time as the judge directs (Rule 49).

The Court may, if it think fit, substitute as a petitioner any such applicant, and may further, if the proposed withdrawal is in the opinion of the Court induced by any corrupt bargain or consideration, by order direct that the security given on behalf of the original petitioner shall remain as security for any costs that may be incurred by the substituted petitioner, and that to the extent of the sum named in such security the original petitioner shall be liable to pay the costs of the substituted petitioner (s. 35 of the Act of 1868). If no such order be made with respect to the security given on behalf of the original petitioner, security to the same amount as would be required in the case of a new petition, and subject to the like conditions, must be given on behalf of the substituted petitioner before he proceeds with his petition, and within the prescribed time after the order of substitution (*ibid.*). A substituted petitioner stands in the same position, as nearly as may be, and is subject to the same liabilities as the original petitioner (*ibid.*).

If a petition is withdrawn, the petitioner is liable to pay the costs of the respondent (*ibid.*). Where there are more petitioners than one, no application to withdraw the petition can be made except with the consent of all the petitioners (*ibid.*).

Before leave for the withdrawal of an election petition will be granted affidavits by all the parties to the petition and their solicitors, and by the Election Agents of all the parties to the petition who were candidates at the election, must be produced, but the Court may on cause shown dispense with the affidavit of any particular person if it seems on special grounds to be just so to do (Corrupt and Illegal Practices Prevention Act, 1883, s. 41 (1)). Where more than one solicitor is concerned for the petitioner or

respondent the affidavit must be made by all such solicitors (*ibid.* s. 41 (8)), and where a person not a solicitor is lawfully acting as agent in the case of an election petition he is deemed to be a solicitor for the purpose of making an affidavit (*ibid.* s. 41 (9)). As to the contents of the affidavits, see *ibid.* s. 41 (2) and (3). Copies of the affidavits must be delivered to the Public Prosecutor a reasonable time before the application for the withdrawal is heard, and the Court may hear the Public Prosecutor or his representative (appointed with the approval of the Attorney-General) in opposition to the allowance of the withdrawal of the petition (*ibid.* s. 41 (5)); see also *Lichfield*, 1892, Day's El. Cas. 8; *Halifax*, 1892, *ibid.* 9). For a discussion of the terms and conditions under which a petition will be allowed to be withdrawn, including the functions of the Public Prosecutor and inquiry by him, and the question of costs, and who is to pay the expense of the necessary inquiries with reference to the reason for withdrawal, the absence of collusion, and the groundlessness of the charges in the petition to be withdrawn, see *Devonport*, 1886, 2 T. L. R. 345.

Recent cases in which the Court has granted leave to withdraw the petition are *Finsbury*, 1892, 4 O'M. & H. 177; *Durham*, 1895.

The Court must be satisfied that the withdrawal is not the result of any corrupt bargain between the parties, and in practice affidavits are required not only from the principal agents on each side but from the petitioners and sometimes also from the sitting member, because the parties themselves might make a compromise without the knowledge of the agents (*North Durham*, 1874, 3 O'M. & H. 5). In *Halifax* (1893, 4 O'M. & H. 203) an application to withdraw was refused on the ground of the insufficiency of the affidavits.

If any person makes any agreement or enters into any undertaking for the withdrawal of the election petition in consideration of any payment, or in consideration that the seat shall at any time be vacated, or in consideration of the withdrawal of any other election petition, or makes any agreement or enters into any undertaking in relation to the withdrawal of an election petition which is not mentioned in the affidavits, he is guilty of a misdemeanour, and liable on conviction on indictment to imprisonment for a term not exceeding twelve months, and to a fine not exceeding £200 (*ibid.* s. 41 (4)).

In every case of the withdrawal of an election petition the Court must report to the Speaker whether in their opinion the withdrawal was the result of any agreement, terms, or undertaking, or was in consideration of any payment, or that the seat should at any time be vacated, or of the withdrawal of any other petition, or for any other consideration, and if so must state the circumstances attending the withdrawal (*ibid.* s. 41 (7)).

Where a petition complains of a double return, and the respondent has given notice to the Master that he does not intend to oppose it, and no party has been admitted to defend such return, then the petitioner, if there be no petition complaining of the other member returned, may withdraw his petition by notice to the Master, who must report the fact of the withdrawal of the petition to the Speaker (s. 40 of the Act of 1868).

*Abatement of Petition.*—An election petition is abated by the death of a sole petitioner or of the survivor of several petitioners. The abatement of a petition does not affect the liability of the petitioner to the payment of costs previously incurred (s. 37 of the Act of 1868). On the abatement of a petition notice must be given in the county or borough to which the petition relates by the person interested, in the same manner as notice of an application to withdraw a petition. Any person who might have been

a petitioner in respect of the election to which the petition relates may apply by motion or summons at chambers, within one calendar month, or such further time as the Court may allow, to be substituted as a petitioner; and the Court may, if it think fit, substitute as a petitioner any such applicant who is desirous of being substituted, and on whose behalf security to the same amount is given as is required in the case of a new petition (*ibid.* s. 37, and Rule 50).

The dissolution of Parliament would also effect an abatement of a pending election petition. The effect of a dissolution of Parliament while an election petition is pending, before the hearing of the petition, is that the petition drops, and the Court will order the sum deposited by the petitioner by way of security for costs to be returned to him (see *Carter v. Mills (Exeter)*, 1874, L. R. 9 C. P. 117; see also *Marshall v. James (Taunton)*, 1874, *ibid.* 702). The death of a respondent does not, however, effect an abatement; a petition may even be presented after the death of the member whose election is disputed (see *Tipperary*, 1875, 3 O'M. & H. 21).

*Special Case.*—Where upon the application of any party to a petition it appears to the Court that the case raised by the petition can be conveniently stated as a special case, the Court may direct the same to be stated accordingly. The application to state a special case may be made by rule in the Queen's Bench Division of the High Court when sitting, or by a summons before a judge at chambers upon hearing the parties. Any such special case is, as far as may be, to be heard before the Court, and the decision of the Court is to be final (s. 11 (16) of the Act of 1868, and Rule 37). One counsel only on each side will be heard on the hearing of a special case (see *Ackers v. Howard (Thornbury)*, 1886, 16 Q. B. D. at p. 746). Though the decision of the Court upon a special case is to be final (see s. 11 (16)), yet apparently an appeal would lie if special leave to appeal be granted (see *Line v. Warren*, 1885, 14 Q. B. D. 548; *Beresford Hope v. Lady Sandhurst*, 1889, 23 Q. B. D. 79; *Unwin v. McMullen*, [1891] 1 Q. B. 694; see also *Shaw v. Reckitt (Pontefract)*, [1893] 2 Q. B. 59).

The determination of the Court in reference to the special case must be certified by the Court to the Speaker (s. 11 (16)).

For instances of special cases granted in parliamentary election petitions, see *New Sarum*, 1869, L. R. 4 C. P. 369; *Hereford*, 1869, 19 L. T. N. S. 703; *Manchester*, 1869, L. R. 4 C. P. 296; *Haverfordwest*, 1874, L. R. 9 C. P. 720).

**TRIAL OF PETITION.**—*Election List.*—The Master is required to make out a list of all petitions which are at issue, placing them in the order in which they were presented, and such petitions, as far as conveniently may be, are to be tried in the order in which they stand in the list (s. 10 of the Act of 1868, and Rule 30). Where more than one petition has been presented against a candidate, the petitions may be tried together (*Yorkshire*, 1869, 1 O'M. & H. 213; *Poole*, 1874, 2 O'M. & H. 123).

*Constitution of the Election Court.*—The trial of an election petition is now conducted before two judges of the Queen's Bench Division of the High Court, who are selected from a rota formed of three judges of the Queen's Bench Division (see s. 11 of the Act of 1868; *Parliamentary Elections and Corrupt Practices Act*, 1879, s. 2; and *Judicature Act*, 1881, s. 13). The three judges placed on the rota for the trial of election petitions during the ensuing year are selected by the majority of votes of the judges of the Queen's Bench Division on or before the 4th November in every year, and,

in case the judges present at the time of their meeting to make such selection are equally divided in their choice of any judge to be placed upon the rota, the Lord Chief Justice of England, or in case of his absence, the senior judge then present, has a second or casting vote. The choice of a judge to fill any occasional vacancy upon the rota, or to assist the judge on the rota as an additional judge, is to be made in like manner. If at the end of the year for which any such judge is appointed any trial or other matter be pending and not concluded, or if after the conclusion of the trial or of the hearing of any such matter judgment has not been given thereon, he may proceed with and conclude the trial or other matter, and give judgment thereon after the end of such year as if it had not expired (Judicature Act, 1881, s. 13; see also Corrupt and Illegal Practices Prevention Act, 1883, s. 42). Any judge placed on the rota is re-eligible in the succeeding or any subsequent year. In the event of the death or illness of any judge for the time being on the rota, or his inability to act for any reasonable cause, the vacancy is to be filled as above mentioned (s. 11 (4) and (5) of the Act of 1868). An additional judge or judges may also be appointed where the judges on the rota, having regard to the list of petitions, consider that there would otherwise be inconvenient delay in the trial of any of the petitions (*ibid.* s. 11 (7)).

The judges for the time being on the rota are, according to their seniority, respectively to try the election petitions standing for trial, unless they otherwise agree among themselves, in which case the trial of each election petition is to be taken as provided by such agreement (*ibid.* s. 11 (8)). An election petition is tried by two of the judges on the rota sitting in open Court without a jury (*ibid.* s. 11 (9)); see also Parliamentary Elections and Corrupt Practices Act, 1879, s. 2).

*Powers of Election Court.*—The Election Court held for the trial of an election petition is a Court of Record, and the judges have the same powers, jurisdiction, and authority as judges of the High Court, and as judges of assize and Nisi Prius (*ibid.* s. 29; as to the title of the Court, see Rule 38).

*The Registrar.*—An officer termed the Registrar is to be appointed for each Court for the trial of an election petition, who is to attend at the trial as the clerks of assize and arraigns attend at the assizes, and to perform all the functions incident to the officer of a Court of Record (Rule 39). The Registrar opens the proceedings at the trial by administering the oath to the shorthand writer of the House of Commons, or his deputy, who must attend and take down the evidence (see s. 24 of the Act of 1868); the Registrar then reads the petition, and the trial commences.

*Notice of Trial.*—Notice of the time and place of trial must be put up in the Master's office, and sent by him by post fifteen days before the day fixed for the trial to the petitioners and respondents, and to the returning officer, *i.e.* the sheriff or mayor as the case may be; notice of the time and place of trial of each election petition must also be transmitted by the Master to the Treasury and to the Clerk of the Crown in Chancery (see Rules 31, 32, and 62; s. 11 (10) of the Act of 1868; for form of notice, see Rule 32).

*Place of Trial.*—The trial of an election petition in the case of a petition relating to a borough election must take place in the borough, and in the case of a petition relating to a county election in the county (s. 11 (11) of the Act of 1868). If, however, it appears to the Court (*i.e.* the Queen's Bench Division) that special circumstances exist which render it desirable that the petition should be tried elsewhere than in the borough or county, the Court has power to appoint such other place for the trial as may appear

most convenient (*ibid.*). As to what "special circumstances" are sufficient to induce the Court to change the place of trial from the county or borough where the election was held, see *Sligo*, 1869, 1 O'M. & H. 300; *Collins v. Price*, 1880, 5 C. P. D. 544; *Arch v. Bentinck*, 1887, 18 Q. B. D. 548; *Hexham*, 1892, Day's El. Cas. 26; *Lawson v. Chester Master (Cirencester)*, *ibid.* 27, and [1893] 1 Q. B. 245. In the case of a petition relating to any of the boroughs within the metropolitan district, the trial may be at such place within the district as the Court may appoint (s. 11 (11)); several petitions have in accordance with this provision been tried at the Royal Courts of Justice (*e.g.* *Kennington*, 1886; *Finsbury*, 1892; *Stepney*, 1892; *Shoreditch*, 1896; *Tower Hamlets*, 1896). Where no place of trial is fixed as above, the time and place of trial of each election petition is to be fixed by the judges on the rota (Rule 31). The order to change the place of trial from the county or borough where the election took place must be made by the Court, and not by a judge at chambers (*Collins v. Price (Tewkesbury)*, 1880, 5 C. P. D. 544).

*Reception of Election Judges.*—The judges are to be received at the place where they are about to try an election petition with the same state, so far as circumstances admit, as judges of assize are received at an assize town (s. 28 of the Act of 1868). In the case of a petition relating to a county election the sheriff, and in any other case the mayor, in a borough having a mayor, and in the case of a borough not having a mayor, the sheriff of the county, or some person named by him, must receive the judges (*ibid.*).

*Expenses of Election Court.*—The travelling and other expenses of the judges, and all expenses properly incurred by the sheriff or by such mayor or other person in receiving the judges and providing them with necessary accommodation and with a proper court, are to be defrayed by the Treasury out of money provided by Parliament (*ibid.*). The judges are to be attended on the trial of an election petition in the same manner as if sitting at Nisi Prius, and the expenses of such attendance are to be deemed to be part of the expenses of providing a court (*ibid.* s. 30).

*Postponement of Trial.*—The beginning of the trial may be postponed from time to time by judge's order made upon the application of a party to the petition. It may also be postponed by the judge directing notice to be sent to the returning officer, which notice, when received, is forthwith to be made public by the returning officer. The trial will in such cases stand postponed until the day named in the order or notice (see Rule 34).

*Adjournment of Trial.*—In the event of the two election judges, or either of them, not having arrived at the time appointed for the trial, or to which the trial is postponed, the commencement of the trial would *ipso facto* stand adjourned to the ensuing day, and so from day to day (see Rule 35).

The judges presiding at the trial have power to adjourn the trial from time to time, and from any one place to any other place within the county or borough, as may be expedient (s. 11 (12) of the Act of 1868). But when the trial has commenced no formal adjournment of the Court is necessary, for the trial is to be deemed adjourned, and may be continued from day to day until the inquiry is concluded (Rule 36). The trial of every election petition, so far as is practicable consistently with the interests of justice, is to be continued *de die in diem* on every lawful day until its conclusion (Corrupt and Illegal Practices Prevention Act, 1883, s. 42).

In the event of one of the two judges presiding at the trial dying, or being disabled by illness or otherwise before the conclusion of the trial,

another judge would have to take his place, and the trial would have to be recommenced (see s. 11 (5) of the Act of 1868, and Rule 36).

*Evidence.*—The ordinary rules of evidence are as a general rule applicable at the trial of an election petition. There is, however, this exception to the ordinary principles of evidence with regard to proof of agency, that at the trial of an election petition, unless the Court otherwise directs, any charge of a corrupt practice may be gone into, and evidence in relation thereto received, before any proof has been given of agency on the part of any candidate in respect of such corrupt practice (s. 17 of the Act of 1868; see *Bristol*, 1870, 2 O'M. & H. 29). As to the evidence of agency at elections, see AGENCY, ELECTION.

Evidence cannot in general be given of matters not referred to in the particulars. No evidence may be given by a respondent of any objection to the election not specified in the list of objections given by the petitioner, except by leave of the Court (see Rule 8). Evidence is, however, admissible to contradict a witness upon matters collateral to the issue (see *North Norfolk*, 1869, 1 O'M. & H. 239).

Where a respondent has been substituted in accordance with the provisions of the Act of 1868 (see *ante*), any admission by the original respondent is evidence against the substituted respondent (see *Tipperary*, 1875, 3 O'M. & H. 34).

As to order for the production of telegrams by the Post Office, see *Bolton*, 1874, 2 O'M. & H. 139; *Harwich*, 1880, 3 O'M. & H. 62.

The evidence of persons unable to attend the trial through illness may be taken on commission before the Registrar of the Election Court (see *Wallingford*, 1869, 1 O'M. & H. 58; *Montgomery*, 1892, Day's El. Cas. 29; *Worcester*, 1892, *ibid.*).

As to recriminatory evidence, see *post*, *Recriminatory Case*.

*Witnesses.*—Witnesses must be subpoenaed and sworn in the same manner, as nearly as circumstances admit, as in a trial at Nisi Prius (s. 31 of the Act of 1868). Notice of trial must be given before subpoenas can be issued, otherwise it would be impossible to insert the time and place of trial (*Stepney*, 1892, Day's El. Cas. 26). As to subpoena duces tecum, see *Hexham*, 1892, *ibid.* As to an order for the attendance of witnesses out of the jurisdiction, see *Cashel*, 1869, 1 O'M. & H. 287.

On the trial of an election petition the judges have power by order to compel the attendance of any person as a witness who appears to have been concerned in the election to which the petition refers, and any person refusing to obey such order is guilty of contempt of Court (s. 32 of the Act of 1868). Such an order will be made where a witness has evaded service of a subpoena, or does not attend on his subpoena (see *Norwich*, 1869, 1 O'M. & H. 9; *Waterford*, 1870, 2 O'M. & H. 3; *Longford*, 1870, *ibid.* 12; *Galway*, 1872, *ibid.* 50; *Taunton*, 1874, *ibid.* 70). For form of order to compel the attendance of a person as a witness, see Rule 41; for form of warrant for committal, Rule 42; and as to the direction and execution of such warrant, Rule 43.

The judges may examine any witness so compelled to attend, or any person in Court, although such witness is not called and examined by any party to the petition; such witness may afterwards be cross-examined on behalf of the petitioner and respondent, or either of them (s. 32; see also *Montgomery*, 1892, 4 O'M. & H. 169).

Witnesses at the trial of an election petition are subject to the same penalties for perjury as in a trial at Nisi Prius (s. 31; see also *Worcester*, 1892, Day's El. Cas. 26; *Stepney*, 1892, *ibid.*). In recent cases applications

have been made to the Election Court for warrants against witnesses for perjury, but the Court usually requires the usual proceedings to be taken before a magistrate (see *Worcester*, 1892, Day's El. Cas. 80; *Montgomery*, 1892, *ibid.*).

No witness called at the trial of any election petition is liable to be asked, or bound to answer, any question for the purpose of proving the commission of any corrupt practice at or in relation to any election prior to 1883 (Corrupt and Illegal Practices Prevention Act, 1883, s. 49; see *Norwich*, 1886, 4 O'M. & H. 90). And no witness can be required to state for whom he voted (Ballot Act, 1872, 35 & 36 Vict. c. 33, s. 12), nor can he be asked what party he belongs to (see *Harwich*, 1880, 3 O'M. & H. 63; see also *North Durham*, 1874, *ibid.* 1).

Witnesses may be ordered out of Court, even though the petition contains charges against them (*Montgomery*, 1892, Day's El. Cas. 30).

As to the allowance of the expenses of witnesses, see sec. 34 of the Act of 1868.

*Certificates of Indemnity.*—Witnesses called before any Election Court are not excused from answering any question relating to any offence connected with the election on the ground that the answer thereto may criminate or tend to criminate themselves, or on the ground of privilege (Corrupt and Illegal Practices Prevention Act, 1883, s. 59 (1)). But a witness who answers truly (see *Worcester*, 1892, Day's El. Cas. 79) all questions which he is required by the Election Court to answer is entitled to receive a certificate of indemnity; and an answer by a witness to a question put by or before any Election Court is not, except in criminal proceedings for perjury in respect of such evidence, admissible in evidence against him in any proceeding, civil or criminal (*ibid.*). Where a person has received such a certificate of indemnity, and any legal proceeding is at any time instituted against him for any election offence committed by him previously to the date of the certificate, the Court having cognisance of the case must, on proof of the certificate, stay the proceeding, and may in their discretion award him costs (*ibid.* s. 59 (2)). A person who has received a certificate of indemnity is not, however, thereby relieved from any incapacity under the Corrupt and Illegal Practices Prevention Act, 1883, or from any proceeding to enforce such incapacity, other than a criminal prosecution (*ibid.* s. 59 (3)).

*Scrutiny.*—A scrutiny may be asked for in the petition if the seat is claimed for an unsuccessful candidate.

When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the petitioner and the respondent must, six days before the day appointed for the trial, deliver to the Master, and also at the address, if any, given by the other side, a list of the votes intended to be objected to, and of the heads of objection to each such vote; no evidence can be given against the validity of any vote, nor upon any head of objection not specified in the scrutiny list, except by leave of the Court or judge, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs as may be ordered (Rule 7). See *Munro v. Balfour* (*East Manchester*), [1893] 1 Q. B. 113; see also *Day's El. Cas.* 16.

The scrutiny takes place at the trial, and should, as a rule, be taken before the recriminatory case (see *Stepney*, 1886, 4 O'M. & H. 35; see, however, *Yorkshire*, 1869, 1 O'M. & H. 214; *Petersfield*, 1874, 2 O'M. & H. 95). In a recent petition the Court refused to deal with an application to amend the scrutiny list until the recriminatory case had been heard



(*Tower Hamlets*, 1896, 5 O.M. & H. 103). As to the procedure on a scrutiny, see SCRUTINY.

*Recriminatory Case*.—On the trial of a petition complaining of an undue return, and claiming the seat for some person, the respondent may give evidence to prove that the election of such person was undue in the same manner as if he had presented a petition complaining of such election (s. 53 of the Act of 1868). When the respondent intends to give recriminatory evidence he must, six days before the day appointed for the trial, deliver to the Master, and also at the address, if any, given by the petitioner, a list of the objections to the election upon which he intends to rely, and the Master must allow inspection and office copies of such lists to all parties concerned (Rule 8). No evidence can be given by a respondent of any objection to the election not specified in the list, except by leave of the Court or judge, upon such terms as to amendments of the list, postponement of the inquiry, and payment of costs as may be ordered (*ibid.*).

Recriminatory evidence can be given only when the seat is claimed (see *Blackburn*, 1869, 1 O.M. & H. 199; *North Durham*, 1874, 2 O.M. & H. 154; *Thirsk*, 1880, 3 O.M. & H. 113).

The recriminatory case follows the trial of the petition, and is in the nature of a cross petition; but where a scrutiny is claimed it should be taken before the recriminatory case (see *Stepney*, 1886, 4 O.M. & H. 35; see, however, *Tower Hamlets*, 1896, 5 O.M. & H. 103).

The recriminatory case may be withdrawn at the trial; all the parties being before the Court, notice to the Public Prosecutor is not necessary as in the case of the withdrawal of an original petition. In a recent petition the scrutiny not being proceeded with at the trial, the Court allowed the recriminatory case to be withdrawn, subject to cause being shown by the Public Prosecutor, if desirable, on notice within a week to restore it (see *Shoreditch*, 1896, 5 O.M. & H. 88). In another petition, after the hearing of the recriminatory case, the scrutiny was, by leave of the Court, not proceeded with (*Tower Hamlets*, 1896, 5 O.M. & H. 117).

*Reservation of Points of Law*.—If on the trial of the petition it appear to the judges that any questions of law, as to the admissibility of evidence or otherwise, require further consideration by the Court (*i.e.* the Queen's Bench Division), they have power to reserve the same in like manner as questions are reserved by a judge on a trial at Nisi Prius, and to postpone the granting of the certificate until the determination of the same (s. 12 of the Act of 1868).

An application at the trial to reserve a question of law for the consideration of the Queen's Bench Division must be made before the decision of the question by the Election Court (see *Londonderry*, 1886, 4 O.M. & H. 103). As to the reservation of questions of law, see *Ackers v. Howard* (*Thornbury*), 1886, 16 Q. B. D. 739; *Issacson v. Durant* (*Stepney*), 1886, 17 Q. B. D. 54; *Thornbury*, 1886, 4 O.M. & H. 68.

*The Public Prosecutor*.—The Director of Public Prosecutions (now the Solicitor to the Treasury, see the Prosecution of Offences Act, 1884, 47 & 48 Vict. c. 58, s. 2) must by himself or by his assistant or representative attend at the trial of every election petition (Corrupt and Illegal Practices Prevention Act, 1883, s. 43 (1)). The Public Prosecutor may nominate with the approval of the Attorney-General a barrister or solicitor of not less than ten years' standing to be his representative at the trial (*ibid.* s. 43 (7)). It is the duty of the Public Prosecutor to obey any directions given to him by the Election Court with respect to the summoning and examination of any witness to give evidence

at the trial, and with respect to the prosecution by him of offenders, and with respect to any person to whom notice is given to attend with a view to report him as guilty of any corrupt or illegal practice (*ibid.* s. 43 (1)). It is also the duty of the Public Prosecutor, without any direction from the Election Court, if it appears to him that any person is able to give material evidence as to the subject of the trial, to cause such person to attend the trial, and with leave of the Court to examine such person as a witness (*ibid.* s. 43 (2)). In a recent petition the Public Prosecutor was directed by the Court to call and examine the respondent's Election Agent, who had not been called as a witness by either party (*Hexham*, 1892, Day's El. Cas. 30). The Court gave leave to the Public Prosecutor to call witnesses in *Rochester*, 1892, and *Montgomery*, 1892. The Public Prosecutor should only call witnesses to prove the guilt of individuals, and not as to other matters in issue in the petition, except where there is collusion between the parties to the petition in withholding evidence (see *Rochester*, 1892, 4 O'M. & H. 158).

It has been the practice at all recent petitions for the Public Prosecutor to be represented at the trial by counsel. He has in addition appointed agents to assist him in petitions where he has called witnesses by the direction or by leave of the Court (*e.g.* in *Hexham*, 1892; *Worcester*, 1892; *Rochester*, 1892; *Montgomery*, 1892; see Day's El. Cas. 25). He should also appear upon the hearing of an application to withdraw a petition; in one case where there was no evidence that copies of the affidavits had been sent to him, and he did not appear, the application for leave to withdraw the petition was refused (*Halifax*, 1893, 4 O'M. & H. 203). As to cross-examination of witnesses by counsel for the Public Prosecutor, see *Stepney*, 1886, 4 O'M. & H. 36; *Buckrose*, 1886, *ibid.* 115; *Hexham*, 1892, Day's El. Cas. 30.

*Prosecution before Election Court.*—The Public Prosecutor must, without any direction from the Election Court, when it appears that any person who has not received a certificate of indemnity has been guilty of a corrupt or illegal practice, prosecute such person for the offence before the Election Court, or if he thinks it expedient in the interests of justice before any other competent Court (Corrupt and Illegal Practices Act, 1883, s. 43 (3); see also *Ipswich*, 1886, 4 O'M. & H. 75; *Belfast*, 1886, *ibid.* 109).

When a person is prosecuted before an Election Court for any corrupt or illegal practice, and appears before the Court, the Court must proceed to try him summarily. But in the case of a corrupt practice the Court before proceeding to try any person summarily must give him the option of being tried by a jury (s. 43 (4) of the Act of 1883; as to the consequences of conviction before an Election Court, see *ibid.*; see also CORRUPT PRACTICES; ILLEGAL PRACTICES). Where a person is so prosecuted, and either elects to be tried by a jury, or does not appear before the Court, or if the Court thinks it expedient that he should be tried before some other Court, the Court, if of opinion that the evidence is sufficient to put him upon his trial for the offence (see *R. v. Shellard*, 1889, 23 Q. B. D. 273), must order him to be prosecuted on indictment, or before a Court of summary jurisdiction, as the case may require, and in either case may order him to be prosecuted before such Court as may be named in the order (see *R. v. Riley*, 1890, 59 L. J. M. C. 122), and for all purposes incidental to such prosecution the offence is to be deemed to have been committed within the jurisdiction of the Court so named (s. 43 (5) of the Act of 1883). As to committing the accused for trial in the case of indictable offences, ordering him to be brought before the Court of summary juris-

diction before whom he is to be prosecuted in the case of non-indictable offences, issuing summons for his attendance or warrant for apprehension when not present before the Court, and allowing him to give bail, see *ibid.* s. 43 (6).

*Costs.*—The costs, charges, and expenses of and incidental to the presentation of a petition, and to the proceedings consequent thereon, are to be defrayed by the parties to the petition in such manner and in such proportions as the Court may determine, regard being had to the disallowance of any costs, charges, or expenses which may in the opinion of the Court have been caused by vexatious conduct, unfounded allegations, or unfounded objections on the part either of the petitioner or the respondent, and regard being had to the discouragement of any needless expenses by throwing the burden of defraying the same on the parties by whom it has been caused, whether such parties are or not on the whole successful (s. 41 of the Act of 1868).

Where it appears to the Election Court that a corrupt practice has not been proved to have been committed in reference to the election by or with the knowledge and consent of the respondent, and that the respondent took all reasonable means to prevent corrupt practices being committed on his behalf, the Court may make one or more of the following orders with respect to the payment of the whole or part of the costs of the petition:—(1) If it appears to the Court that corrupt practices extensively prevailed, they may order the whole or part of the costs to be paid by the county or borough; (2) if any persons are proved to have been extensively engaged in corrupt practices, or to have encouraged or promoted extensive corruption, the Court may, after giving them an opportunity of being heard by counsel or solicitor, and examining and cross-examining witnesses to show cause why the order should not be made, order the whole or part of the costs to be paid by those persons, or any of them, and may order that if the costs cannot be recovered from one or more of such persons they shall be paid by some other of such persons or by either of the parties to the petition (Corrupt and Illegal Practices Prevention Act, 1883, s. 44 (1)). Moreover, where any person appears to the Court to have been guilty of a corrupt or illegal practice, he may be ordered to pay the whole or any part of the costs of or incidental to any proceeding before the Court in relation to such offence (*ibid.* s. 44 (2)).

The costs of an election petition are, therefore, entirely in the discretion of the Court (see per Pollock, B., *Tower Hamlets*, 1896); such discretion, however, being exercised in accordance with the foregoing considerations. Though, as a general rule, the unsuccessful party has to pay the costs, the costs following the event (see *Hereford*, 1869, 1 O'M. & H. 195; *Barrow-on-Furness*, 1886, 4 O'M. & H. 83; *Kennington*, 1886, *ibid.* 95; *Worcester*, 1892, *ibid.* 154; *Manchester*, 1892, *ibid.* 122; *Halifax*, 1893, *ibid.* 204; *Elgin and Nairn*, 1895, 5 O'M. & H. 16; *Lichfield*, 1895, *ibid.* 38; *Lancaster*, 1896, *ibid.* 52; *Sunderland*, 1896, *ibid.* 67), yet the expenses are very numerous; and where the petition is justified, though in the event the petitioner may be unsuccessful, and in some cases even where the petitioner succeeds, each party is frequently ordered to pay his own costs (see *Guildford*, 1869, 1 O'M. & H. 15; *Norwich*, 1869, *ibid.* 12; *Stafford*, 1869, *ibid.* 234; *Thornbury*, 1886, 4 O'M. & H. 69; *Stepney*, 1886, 4 O'M. & H. 58; *Walsall*, 1892, *ibid.* 120; *Cirencester*, 1893, *ibid.* 199; *Pontefract*, 1893, *ibid.* 201). In recent cases, moreover, there appears to be a tendency for the costs to be apportioned between the petitioners and respondents in respect of the various issues, the successful party being given the general costs of

the petition, but having to pay the other side the costs of charges which failed (see *Hexham*, 1892, 4 O'M. & H. 151; *South Meath*, 1892, *ibid.* 142; *Rochester*, 1892, *ibid.* 161; *North Meath*, 1892, *ibid.* 193; *Southampton*, 1895, 5 O'M. & H. 24; see also *Shoreditch*, 1896, *ibid.* 88, and *Tower Hamlets*, 1896, *ibid.* 116).

In cases where the judges differ, or in respect of charges upon which the judges differ, no costs as a rule are ordered (see *Down*, 1880, 3 O'M. & H. 129; *Montgomery*, 1892, 4 O'M. & H. 170; *Shoreditch*, 1896, 5 O'M. & H. 88).

Where the petition is caused by the conduct of the returning officer, e.g. by miscounting the ballot papers, the Court may order him to pay the costs if he is a party to the petition (see *East Clare*, 1892, 4 O'M. & H. 166; *Halifax*, 1893, *ibid.* 205). But such an order is rarely made (see *Hackney*, 1874, 2 O'M. & H. 87; *Greenock*, 1892, Day's El. Cas. 82).

With regard to the costs of the Public Prosecutor, it is provided that they are in the first instance to be paid by the Treasury: but if for any reasonable cause it seems just, the Court may order all or part of them to be repaid to the Treasury by the parties to the petition, or such of them as the Court may direct (Corrupt and Illegal Practices Prevention Act, 1883, s. 43 (8)). In pursuance of this provision the persons whose conduct has rendered the costs of the Public Prosecutor necessary have in some cases been ordered to pay his costs. Thus in *Kennington* (1886, 4 O'M. & H. 95) and *Worcester* (1892, *ibid.* 155), the petitioner, and in *Hexham* (1892, *ibid.* 152), the respondent, was ordered to pay his costs, and in *Rochester* (1892, *ibid.* 161), two persons who were found guilty by the Election Court were ordered to pay so much of his costs as were solely attributable to their offences. In most cases, however, the application for the costs of the Public Prosecutor, which is almost invariably made by his representative at the close of the petition, is not granted; for, although it is right that the Public Prosecutor should be represented, the parties to the petition should not, unless under exceptional circumstances, be burdened with the expense (see *Norwich*, 1886, 4 O'M. & H. 92; *London-derry*, 1886, *ibid.* 104; *Belfast*, 1886, *ibid.* 109; *Walsall*, 1892, *ibid.* 129; *Montgomery*, 1892, *ibid.* 170; *Finsbury*, 1892, *ibid.* 177; *Pontefract*, 1893, *ibid.* 202; *Southampton*, 1895, 5 O'M. & H. 25; *Lichfield*, 1895, *ibid.* 38; *Lancaster*, 1896, *ibid.* 52; *Shoreditch*, 1896, *ibid.* 88; *Tower Hamlets*, 1896, *ibid.* 116).

The judgment of the Election Court on the question of costs is final (see *Lovering v. Dawson*, 1875, L. R. 10 C. P. 726).

As to the taxation and recovery of costs of election petitions, see sec. 41 of the Act of 1868, and Rule 55. The amount to be paid to any witness whose expenses are allowed by the judges (see s. 34) is to be ascertained and certified by the Registrar (Rule 73; as to the effect of the Registrar's certificate, see *M'Laren v. Home*, 1881, 7 Q. B. D. 477). The Rules and Regulations of the Supreme Court of Judicature with respect to costs to be allowed in actions, causes, and matters in the High Court are in principle, and so far as practicable, to apply to the costs of election petitions, and no costs are to be allowed on a higher scale than would be allowed in any action, cause, or matter in the High Court on the higher scale as between solicitor and client (Corrupt and Illegal Practices Prevention Act, 1883, s. 44 (3)).

**CERTIFICATE AND REPORT OF ELECTION COURT.—Certificate.**—At the conclusion of the trial the judges who tried the petition must determine

whether the member whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void (s. 11 (13) of the Act of 1868).

In delivering judgment at the conclusion of the trial it is the practice for the Election Court, unlike the old Election Committees, to state the reasons upon which their judgment is founded (see *Ipswich*, 1886, 4 O'M. & H. 71; *Norwich*, 1886, *ibid.* 90).

The judges must certify in writing such determination to the Speaker, and upon such certificate being given such determination is final to all intents and purposes (s. 11 (13) of the Act of 1868). The certificate must be under the hands of both judges (Parliamentary Elections and Corrupt Practices Act, 1879, s. 2). If the judges differ as to whether the member whose return or election is complained of was duly returned or elected, they must certify that difference, and the member is to be deemed to be duly elected or returned; and if the judges determine that the member was not duly elected or returned, but differ as to the rest of the determination, they must certify that difference, and the election is to be deemed to be void (*ibid.*).

*Report as to Corrupt and Illegal Practices.*—Where any charge is made in the election petition of any corrupt practice having been committed at the election the judges must, in addition to such certificate and at the same time, report to the Speaker as follows: (1) Whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, and the nature of such corrupt practice; (2) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice; (3) whether corrupt practices have, or whether there is reason to believe that corrupt practices have, extensively prevailed at the election to which the petition relates (s. 11 (14) of the Act of 1868).

The report must contain similar particulars with regard to illegal practices, sec. 11 (14) of the Act of 1868 having now to be applied as if re-enacted with the substitution of "illegal practices" for "corrupt practices"; and the judges must also report whether any candidate at the election has been guilty by his agents of any illegal practice in reference to such election (see Corrupt and Illegal Practices Prevention Act, 1883, s. 11). This report, like the certificate, must be under the hands of both judges (Parliamentary Elections and Corrupt Practices Act, 1879, s. 2).

If the judges differ as to the subject of a report to the Speaker, they must certify that difference and make no report on the subject on which they so differ (*ibid.*).

The Election Court, when reporting that certain persons have been guilty of any corrupt or illegal practice, must report whether those persons have or have not been furnished with certificates of indemnity (Corrupt and Illegal Practices Prevention Act, 1883, s. 60).

Such report is to be laid before the Attorney-General with a view to his instituting or directing a prosecution against such persons as have not received certificates of indemnity, if the evidence should, in his opinion, be sufficient to support a prosecution (*ibid.*).

But before any person, other than a party to the petition or a candidate on behalf of whom the seat is claimed by the petition, is reported by the Election Court to have been guilty of any corrupt or illegal practice, the Court must cause notice to be given to such person, and if he appears in pursuance of the notice must give him an opportunity of being heard "by himself," and of calling evidence in his defence to show why he should not

be so reported (*ibid.* s. 38 (1)). As to the service of such notice, *ibid.* s. 62 (2); and as to the form of such notice, see *Hexham*, 1892, Day's El. Cas. 78. A person to whom notice is given to appear and show cause why he should not be reported has no right to be heard by counsel (see *R. v. Mansel Jones*, 1889, 23 Q. B. D. 29), though in some cases the Court have allowed counsel on behalf of such persons to show cause against their being reported (see *Hexham*, 1892, Day's El. Cas. 78; *Rochester*, 1892, *ibid.*).

As to what are corrupt and illegal practices, and as to the consequences of being reported guilty of corrupt or illegal practices by an Election Court, see CORRUPT PRACTICES; ILLEGAL PRACTICES; see also ELECTION COMMISSIONERS.

The report of the judges at the trial of an election petition is not final and conclusive, like their certificate, as to the matters contained in it. So where A., a candidate at an election, petitioned against the return of B., and claimed the seat, and recriminatory charges were made but subsequently withdrawn at the trial, and the claim to the seat abandoned, the judge certified that B. was not duly elected, and reported that he believed the election on the part of A. to have been perfectly pure; A. was returned at the ensuing election, and a petition was presented against his return, alleging corrupt practices by him and his agents at the previous election; it was held that notwithstanding the report, evidence could be given of the alleged corrupt practices (*Stevens v. Tillet (Norwich)*, 1870, L. R. 6 C. P. 147).

*Special Report.*—The judges may when they make their report as to corrupt and illegal practices at the same time make a special report to the Speaker as to any matters arising in the course of the trial, an account of which in their judgment ought to be submitted to the House of Commons (s. 11 (15) of the Act of 1868). Where the judges make a special report, the House of Commons may make such order in respect of it as they think proper (*ibid.* s. 14).

*Relief.*—As to the circumstances under which candidates, the Election Agents, and other persons may on application obtain relief from the consequences of the illegal acts of themselves or their agents reported by the Election Court, see the Corrupt and Illegal Practices Prevention Act, 1883, ss. 22, 23, and 24; see also RELIEF.

## II. MUNICIPAL AND OTHER ELECTION PETITIONS.

**MUNICIPAL ELECTIONS.**—*Former Procedure.*—Municipal elections until 1872 could only be questioned by means of an information in the nature of a *quo warranto*. The Corrupt Practices (Municipal Elections) Act, 1872, 35 & 36 Vict. c. 60, substituted procedure by means of election petition for the former procedure by *quo warranto*.

*Present Practice.*—The procedure for questioning a municipal election by petition is now regulated by Part IV. of the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, as amended by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 & 48 Vict. c. 70, and the General Rules for the effectual execution of Part IV. of the Municipal Corporations Act, 1882, made in 1883 by the judges for the time being on the rota for the trial of parliamentary election petitions. As to these rules of procedure, see sec. 100 (1) and (2) of the Act of 1882, and sec. 30 (b) of the Act of 1884, which transfers the power of making rules from the judges on the rota to the Rule Committee of the judges.

The procedure provided by the Acts of 1882 and 1884, and the Municipal Election General Rules made thereunder, is founded on, and as

nearly as the circumstances admit identical with, that which regulates parliamentary election petitions. . It is, moreover, expressly enacted that, subject to the provisions of the Act of 1882 and of the rules made under it, the principles, practice, and rules for the time being observed in the case of parliamentary election petitions, and, in particular, the principles and rules with regard to agency and evidence, and to a scrutiny, and to the declaring any person elected in the room of any other person declared to have been not duly elected, shall be observed, as far as may be, in the case of a municipal election. It follows also that the decisions cited with reference to parliamentary election petitions are applicable to municipal election petitions.

It is therefore unnecessary here to recapitulate what has already been said with regard to parliamentary election petitions, which, subject to the necessary modifications, is to a great extent applicable to municipal elections, but some points of difference with regard to municipal election petitions may be briefly noticed.

*Procedure by Quo Warranto.*—Procedure by information in the nature of a *quo warranto* is still available against any person claiming to hold a corporate office who becomes disqualified *after election* within twelve months of the time when he became disqualified (see the M. C. Act, 1882, s. 225). It would appear also to be available in other cases, it being provided that every municipal election not called in question within twelve months after the election, either by election petition or by *information in the nature of a quo warranto*, is to be deemed to have been to all intents a good and valid election (*ibid.* s. 73; see, however, *Pritchard v. Mayor, etc., of Bangor*, 1888, 13 App. Cas. 241). But *quo warranto* is not available in cases where an election petition lies (see *ibid.* s. 87; see also *R. v. Morton*, [1892] 1 Q. B. 39).

*Grounds of Election Petition.*—A municipal election may be questioned by an election petition on any of the following grounds:—

- (1) That the election was as to the borough or ward wholly avoided by general bribery, treating, undue influence, or personation;
- (2) That the election was avoided by corrupt practices, or offences against Part IV. of the M. C. Act, 1882, committed at the election;
- (3) That the person whose election is questioned was at the time of the election disqualified;
- (4) That he was not duly elected by a majority of lawful votes (M. C. Act, 1882, s. 87 (1));
- (5) That the election was avoided by any illegal practice, or by the extensive prevalence of illegal practices, or the offences of illegal payment or hiring (M. E. (C. & I. P.) Act, 1884, ss. 8 and 18).

A municipal election cannot be questioned on any one of those grounds except by an election petition (M. C. Act, 1882, s. 87 (2)).

*Petitioners.*—A municipal election petition may be presented either by four or more persons who voted, or had a right to vote, at the election, or by a person alleging himself to have been a candidate at the election (M. C. Act, 1882, s. 88 (1)).

*Respondents.*—Any person whose election is questioned by the petition, and any returning officer of whose conduct a petition complains, may be a respondent to the petition (*ibid.* s. 88 (2)).

*Time for Petitioning.*—A municipal election petition must be presented within twenty-eight days after the day on which the election was held, except that if it complains of the election on the ground of corrupt practices, and specifically alleges that a payment of money or other reward has been

made or promised since the election by a person elected at the election, or on his account, or with his privity, in pursuance or furtherance of such corrupt practices, it may be presented at any time within twenty-eight days after the date of the alleged payment or promise, whether or not any other petition against that person has been previously presented or tried (*ibid.* s. 88 (4)).

A municipal election petition complaining of the election on the ground of an illegal practice may be presented at any time within fourteen days after the day on which the Town Clerk receives the return and declaration respecting election expenses, or within the like time after the date of the allowance of an authorised excuse for failing to make the return and declaration (M. E. (C. & I. P.) Act, 1884, s. 25 (1)). When the petition complains of an illegal practice, and specifically alleges a payment or other act since the election by the candidate elected, or by his agent, or with his privity, in pursuance or furtherance of such illegal practice, it may be presented at any time within twenty-eight days after the date of such payment or act, whether or not any other petition against that person has been previously presented or tried (*ibid.* s. 25 (2)).

*Form of Petition, etc.*—The petition should be in the form given in Rule 5 of the Municipal Election General Rules, or to the like effect. The rules with regard to the form, contents, presentation, and service of a municipal election petition are the same as in the case of parliamentary election petitions.

*Security for Costs.*—At the time of presenting a municipal election petition, or within three days afterwards, the petitioner must give security for all costs, charges, and expenses which may become payable by him to any witness summoned on his behalf or to any respondent (M. C. Act, 1882, s. 89 (1)).

The security must be to such an amount not exceeding £500 as the High Court or a judge thereof on summons directs (*ibid.* s. 89 (2)). The mode of giving security is by deposit or by recognisance as in parliamentary petitions.

*Interlocutory Matters.*—All interlocutory matters, except as to the sufficiency of security and the withdrawal of a petition, are to be heard and disposed of before a judge (Municipal Election General Rules, r. 57). The High Court has the same powers, jurisdiction, and authority with respect to a municipal election petition and the proceedings thereon as in an ordinary action (*ibid.* and M. C. Act, 1882, s. 100 (4)). Withdrawal of a municipal election petition can only be by leave of the Election Court or High Court on special application (*ibid.* s. 95). The provisions and rules with reference to amendment of petition, particulars, recount, withdrawal of petition, special cases, etc., are the same in municipal as in parliamentary petitions.

*Constitution of Election Court.*—A municipal election petition is tried by an Election Court consisting of a Commissioner, who is a barrister of at least fifteen years' standing, appointed by the judges on the rota for the trial of parliamentary election petitions. The barrister must not be a member of the House of Commons, or hold any office or place of profit under the Crown, other than that of Recorder, and he is not qualified to constitute an Election Court for the trial of an election petition relating to any borough for which he is Recorder, or in which he resides, or which is on his circuit. If the Commissioner to whom the trial of a petition is assigned dies, or declines, or becomes incapable, to act, the judges on the rota or two of them may assign the trial to be conducted or continued by



any other of the Commissioners appointed. See sec. 92 (1)–(5) of the M. C. Act, 1882.

The judges for the time being on the rota for the trial of parliamentary election petitions, or any two of them, may annually appoint as many barristers, not exceeding five, as they may think necessary, to be Commissioners for the trial of municipal election petitions, and are from time to time to assign the petitions, whether relating to municipal or other elections to which the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, extends, to be tried by each Commissioner (M. E. (C. & I. P.) Act, 1884, s. 36 (2)).

*Powers of Election Court.*—The Election Court has for the purposes of the trial the same powers and privileges as a judge on the trial of a parliamentary election petition, except that any fine or order of committal by the Court may on motion by the person aggrieved be discharged or varied by the High Court or in vacation by a judge thereof on such terms, if any, as the High Court or judge think fit (M. C. Act, 1882, s. 92 (6)).

Except in this respect no appeal lies from the Commissioner to the High Court (see *Ex parte Ayres*, 1886, 54 L. T. N. S. 296; *Preece v. Harding*, 1889, 24 Q. B. D. 110; *Marsland v. Hickman*, 1886, 2 T. L. R. 398). The Municipal Election Court is a Court of Record (*R. v. The Mayor, etc., of Maidenhead*, 1882, 9 Q. B. D. 494).

*Expenses of Election Court.*—The remuneration and allowances to be paid to the Commissioner for his services in respect of the trial of a municipal election petition, and to the officers, clerks, or shorthand writers employed, are to be fixed by a scale made and varied by the election judges on the rota for the trial of parliamentary election petitions, with the approval of the Treasury (M. C. Act, 1882, s. 101 (1)).

The remuneration and allowances must be paid in the first instance by the Treasury, and must be repaid to the Treasury, on their certificate, out of the borough fund or borough rate (*ibid.*).

The Election Court has power, however, in its discretion to order such remuneration and allowances, or the expenses incurred by the Town Clerk for receiving the Election Court, to be repaid, wholly or in part, to the Treasury or the Town Clerk, as the case may be, by the petitioner when in the opinion of the Election Court the petition is frivolous and vexatious, or by the respondent when in the opinion of the Election Court he has been personally guilty of corrupt practices at the election (*ibid.* s. 101 (2)). An order so made for the repayment of any sum by a petitioner or respondent may be enforced as an order for payment of costs, but the deposit or security for costs may not be applied for any such repayment until all costs and expenses payable by the petitioner or respondent to any party to the petition have been satisfied (*ibid.* s. 101 (3)).

*Place of Trial.*—The place of trial of a municipal election petition must be within the borough. But the High Court may, on being satisfied that special circumstances exist rendering it desirable that the petition should be tried elsewhere, appoint some other convenient place for trial (M. C. Act, 1882, s. 93 (5)).

*Trial.*—The procedure at the trial of a municipal election petition, and the principles and practices as to evidence, the attendance and examination of witnesses, scrutiny, recriminatory case, reservation of points of law and costs, are the same as in parliamentary petitions (see M. C. Act, 1882, ss. 93, 94, and 100 (3), and the M. E. (C. & I. P.) Act, 1884, ss. 29 and 32).

The Public Prosecutor must attend at every trial of a municipal election petition, and his duties with regard to calling and examining

witnesses and the prosecution of offenders are also similar to those in parliamentary petitions (see M. E. (C. & I. P.) Act, 1884, ss. 28 and 30).

*Certificate and Report of Election Court.*—At the conclusion of the trial, the Municipal Election Court must determine whether the person whose election is complained of, or any and what other person, was duly elected, or whether the election was void, and must forthwith certify in writing the determination to the High Court, and the decision is final to all intents as to the matters at issue in the petition (M. C. Act, 1882, s. 93 (4); see also *Ex parte Ayres*, 1886, 54 L. T. N. S. 296; *Marsland v. Hickman*, 1886, 2 T. L. R. 398). Where the petition charges any corrupt or illegal practices, the Election Court must make a report to the High Court as to the persons guilty, the prevalence of such offences in the borough or ward, and whether or not the persons reported have been furnished with certificates of indemnity, which report is similar to the report sent by the judges on the trial of a parliamentary election petition to the Speaker (see the M. C. Act, 1882, s. 93 (5) and (6), and the M. E. (C. & I. P.) Act, 1884, ss. 3 (2).<sup>s</sup> (1) and (2), and 30).

A copy of any certificate or report made to the High Court on the trial of a municipal election petition, and, in the case of a decision by the High Court on a special case, a statement of the decision, must be sent by the High Court to the Secretary of State; and a copy of any such certificate, and a statement of any such decision, must also be certified by the High Court, under the hands of two or more judges thereof, to the Town Clerk of the borough (M. C. Act, 1882, s. 93 (12)).

*Prosecution for Election Offences.*—The procedure for the prosecution of a corrupt or illegal practice, or any illegal payment, employment, or hiring, committed in reference to a municipal election, and the removal of any incapacity incurred by reason of a conviction or report relating to any such offences, and the duties of the Public Prosecutor in relation thereto, including the grant to a witness of a certificate of indemnity, is the same as if such offence had been committed in reference to a parliamentary election, and secs. 45, 46, 50–57, 59, and 60 of the Corrupt and Illegal Practices Prevention Act, 1883, apply accordingly, with the necessary modifications, and with some few additions (see M. E. (C. & I. P.) Act, 1884, s. 30).

**MUNICIPAL ELECTIONS IN CITY OF LONDON.**—The provisions of the Municipal Corporations Act, 1882, Part IV., with regard to election petitions, as amended by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, apply, with the necessary modifications, to a municipal election in the City of London (see s. 35 of the M. E. (C. & I. P.) Act, 1884).

**SCHOOL BOARD ELECTIONS, ETC.**—The same provisions, subject to the necessary modifications, extend to elections of members of a School Board, of a Local Board, of Improvement Commissioners, and of Poor Law Guardians (see s. 36 and Sched. I. of the M. E. (C. & I. P.) Act, 1884).

**COUNTY COUNCIL ELECTIONS.**—The same provisions also apply to County Council elections, subject to such modifications as are necessary to make them applicable, and so far as is consistent with the provisions of the Local Government Act, 1888, 51 & 52 Vict. c. 41 (see s. 75 of that Act).

**PARISH COUNCIL ELECTIONS, ETC.**—The same provisions are, by the Local Government Act, 1894, 56 & 57 Vict. c. 73, applied to Parish Council elections and other elections under that Act, subject to the adaptations,

alterations, and exceptions made by the rules framed under the Act (see s. 48 of that Act). For further detail, see the various Election Orders framed under the Local Government Act, 1894, by the Local Government Board, for the election of Parish Councillors, Rural District Councillors, Urban District Councillors, Guardians, Metropolitan Vestrymen and Auditors, and Parish Meetings (where there is no Parish Council).

See also CORRUPT PRACTICES; ILLEGAL PRACTICES; RECOUNT; RELIEF; SCRUTINY, etc.

[*Authorities.*—Rogers on *Elections*, 17th ed., vol. ii. (Parliamentary), 1895; vol. iii. (Municipal, etc.), 1894; Leigh and Le Marchant, *Law of Elections and Election Petitions*, 4th ed., 1895.]

## Elections.

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## I. PARLIAMENTARY ELECTIONS.

**THE WRITS FOR ELECTION.**—*Issue of Writs for Election.*—Members of the House of Commons are elected in pursuance of writs issued from the office of the Clerk of the Crown in Chancery (see the Great Seal (Offices) Act, 1874, 37 & 38 Vict. c. 81, s. 5). The writs for the election of knights, citizens, and burgesses to serve in Parliament are issued under the authority of a Royal Proclamation, in pursuance of which an order from the Crown in Council commands the Lord High Chancellor of Great Britain and the Lord High Chancellor of Ireland (or the Lords Keepers or Lords Commissioners of the Great Seal, if these offices be vacant) to cause writs to be issued (see Simeon, *Law of Elections*, 2nd ed., p. 142; Orme, *Digest of Election Laws*, 2nd ed., pp. 1 *et seq.*; Roe, *Law of Elections*, 2nd ed., vol. i. p. 345).

In the case of the seat of any member being vacated for any cause during the session, on motion made a warrant is signed by the Speaker, directing the Clerk of the Crown in Chancery to issue a writ for the election of a member. As to the various causes of the vacating of seats, see PARLIAMENT; see also Rogers on *Elections*, 17th ed., vol. ii. ch. ii. pp. 42–52.

If after the writ is issued it be found that the seat is not in fact vacant, a *supersedeas* to the writ must be moved for (*c.g.* *Rye*, 1826, 81 Com. Journ. 223; *Preston*, 1830, 86 *ibid.* 134; *Evesham*, 1830, *ibid.* 182; see also Simeon on *Elections*, 2nd ed., p. 144).

The issue of a writ by the Speaker during any recess of the House of Commons, whether by prorogation or adjournment in the case of a member dying or becoming a peer of the United Kingdom, is provided for by the Recess Elections Act, 1784, 24 Geo. III. c. 26. As to the issue of a writ in the case of the acceptance of any disqualifying office by a member during a recess, see 21 & 22 Vict. c. 110; and in the case of a seat becoming vacant by bankruptcy, see the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 33.

**Form of Writ for Election.**—The form of writ for a county or borough now in use at a general election is set forth in Sched. II. of the Ballot Act, 1872, 35 & 36 Vict. c. 33, and is as follows:—

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff [or other returning officer] of the county [or borough] of \_\_\_\_\_, greeting:

Whereas by the advice of our Council we have ordered a Parliament to be holden at Westminster on the \_\_\_\_\_ day of \_\_\_\_\_ next. We command you that notice of the time and place of election being first duly given, you

do cause election to be made according to law of \_\_\_\_\_ members [or a member] to serve in Parliament for the said county [or the \_\_\_\_\_ division of the said county, or the borough, or as the case may be] of \_\_\_\_\_, and that you do cause the names of such members [or member] when so elected, whether they [or he] be present or absent, to be certified to us in our Chancery without delay.

Witness ourself at Westminster, the \_\_\_\_\_ day of \_\_\_\_\_ in the year of our reign, and in the year of our Lord 18 \_\_\_\_\_.

A writ at a bye election is in the following form:—

Victoria, etc. [as above]. Whereas A. B., Esq., was lately chosen member for the county [or as the case may be] of \_\_\_\_\_ for the present Parliament summoned to be holden in our city of Westminster the \_\_\_\_\_ day of \_\_\_\_\_ now last past, and from thence by our several writs prorogued to and until the \_\_\_\_\_ day of \_\_\_\_\_ in the \_\_\_\_\_ year of our reign [as the case may be] and there now holden; and whereas the Honourable Sir [C. D.], knight, and the Honourable Sir [E. F.], knight, being two of the judges on the rota for the trial of election petitions, have in accordance with "the Parliamentary Elections Act, 1868," duly adjudged the election of the said A. B. to be void, or the said A. B. is since dead, or is become a peer, etc. [as the case may be] as by the letter of our right trusty and well-beloved councillor \_\_\_\_\_, Speaker of our Lower House of Parliament, more fully and plainly appears. We command you that in the place of the said A. B., within the county [or borough or division] aforesaid, notice of the time and place, etc. [the remainder of the writ is in the same form as the writ for a general election, see ante].

The writs are addressed to the Returning Officer of the county or borough (see *post*, under the head *Returning Officer*).

*Transmission of Writs.*—The expeditious and regular conveyance of the writs for parliamentary elections is provided for by the Parliamentary Writs Act, 1813, 53 Geo. III. c. 89, which directs that the messenger or pursuivant of the Great Seal (now the officer to whom his duties are transferred, see the Great Seal (Offices) Act, 1874, 37 & 38 Vict. c. 81, s. 4), or his deputy, must after receiving the writs forthwith carry such of them as are directed to the sheriffs of London or sheriff of Middlesex to the offices of such sheriffs; and all other writs to the General Post Office in London, and then deliver them to the postmaster or his deputy, who must give an acknowledgment in writing of their receipt, expressing therein the time of delivery, and must keep a duplicate of such acknowledgment signed by the parties to whom and by whom the writs were so delivered. The postmaster must despatch the writs, free of postage charges, by the first post after receiving them, under covers respectively directed to the officer or officers to whom the writs are respectively directed, accompanied with directions to the postmaster or deputy postmaster of the town or place or nearest to the town or place where such officer or officers holds his or their office, requiring such postmaster or deputy forthwith to carry such writs respectively to such office, and to deliver them to the officer or officers to whom they are respectively directed, who must give a signed receipt for the same, setting forth the day and hour of delivery; this receipt is also to be signed by the postmaster or deputy, who must transmit it to the General Post Office in London, where it must be entered and filed, and kept with the duplicate of the acknowledgment signed by the messenger, so that they may be

inspected or produced upon all proper occasions by any person interested in the elections (see the Parliamentary Writs Act, 1813, s. 1). Any wilful neglect or delay in delivering or transmitting a writ is a misdemeanour (*ibid.* s. 6).

The writs must be delivered to the proper officer to whom the execution thereof belongs (*i.e.* the Returning Officer) or his deputy, and to no other person, and every such officer upon the receipt of the writ must indorse upon the back of it the day he received it (see 7 & 8 Will. III. c. 25, s. 1; for form of such indorsement, see the Ballot Act, 1872, Sched. II.).

**THE RETURNING OFFICER.—At County Elections.**—The Returning Officer in counties and divisions of counties is the sheriff of the county, and, in counties of cities and towns, the sheriff of the county of a city or town.

In all matters relative to the election of members to serve in Parliament for any county, or for any riding, parts or division of a county, the sheriff of the county, his under-sheriff, or any lawful deputy has power to act in all places having any exclusive jurisdiction or privilege, in the same manner as such person may act within any part of the sheriff's ordinary jurisdiction (Representation of the People Act, 1832, 2 & 3 Will. IV. c. 45, s. 66).

Where the sheriff is Returning Officer for more than one county, as defined for the purposes of parliamentary elections (*i.e.* for more than one division of a county), he may, by writing under his hand, appoint a fit person to be his deputy for all or any of the purposes relating to an election in any such county, and may by himself or by such deputy exercise any powers and do any things which the Returning Officer is authorised to exercise or do in relation to such election. Every such deputy, and also any under-sheriff in so far as he acts as Returning Officer, is deemed to be the Returning Officer (Ballot Act, 1872, s. 8).

In the event of the death of the sheriff before the expiration of his year of office, the under-sheriff is answerable for the execution of the office until another sheriff be appointed (see the Sheriffs Act, 1887, 50 & 51 Vict. c. 55, s. 25; there is a similar provision where a sheriff is a militia officer embodied for actual service, see the Militia Act, 1882, 45 & 46 Vict. c. 49, s. 40).

**At Borough Elections.**—With regard to boroughs (other than cities and towns being counties of themselves) the mayor is the Returning Officer at parliamentary elections (Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 244 (1)). If there are more mayors than one within the boundaries of a parliamentary borough, the mayor of that borough to which the writ of election is directed is to be the Returning Officer (*ibid.* s. 244 (2)). In any such case the writ is to be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ was directed before the passing of the Redistribution of Seats Act, 1885; or if it has not been directed to any such mayor, then to the mayor of the borough which has the largest population according to the last census (see Redistribution of Seats Act, 1885, 48 & 49 Vict. c. 23, s. 12 (4)). If when a mayor is required to act as Returning Officer he is absent, or incapable of acting, or there is no mayor, the council must forthwith choose an alderman to be Returning Officer (Municipal Corporations Act, 1882, s. 244 (3)). It is also provided by the Returning Officers Act, 1854, 17 & 18 Vict. c. 57, s. 1, that in all cases whenever, either from temporary vacancy, or from some other cause, there is no person duly qualified to perform the duties of Returning Officer in any borough, city, or town, the sheriff of the county in

which such borough, city, or town is situate must perform the duties of Returning Officer.

As to the appointment of a Returning Officer by the sheriff of the county, in the case of certain boroughs for which Returning Officers were not appointed by the Representation of the People Act, 1832, 2 & 3 Will. iv. c. 45, and which have not been subsequently incorporated, see sec. 11 of that Act, and the Redistribution of Seats Act, 1885, 48 & 49 Vict. c. 23, s. 12; in the case of any parliamentary borough created by the Representation of the People Act, 1867, 30 & 31 Vict. c. 102, which is not and does not include a municipal borough, see sec. 47 of that Act; and in the case of parliamentary boroughs constituted under the Redistribution of Seats Act, 1885, in which there is no mayor, see sec. 12 (1) of that Act.

The Returning Officer in boroughs constituted under the Redistribution of Seats Act, 1885, the area of which was previously comprised in the parliamentary borough of Westminster, is to be the high bailiff of Westminster, who may appoint a deputy returning officer in any such borough (see Redistribution of Seats Act, 1885, s. 12 (5) and (6)).

*At University Elections.*—At university elections the Returning Officer is the Vice Chancellor of the University, who may appoint pro-Vice Chancellors to act as deputies at the poll. As to the Universities of Oxford and Cambridge, see the Parliamentary Elections Act, 1853, 16 & 17 Vict. c. 68, and the University Elections Act, 1861, 24 & 25 Vict. c. 53, s. 2; as to the University of London, see the Representation of the People Act, 1867, ss. 41 and 44; as to the Scotch Universities, see the Representation of the People (Scotland) Act, 1868, 31 & 32 Vict. c. 48, s. 37; and as to the University of Dublin, in which the Provost of Trinity College is the Returning Officer, see the University Elections Act, 1861, 24 & 25 Vict. c. 53, s. 2.

*Exemptions from Office of.*—As to the persons who are exempted from the office of Returning Officer, see RETURNING OFFICER.

*Expenses of.*—As to the Returning Officer requiring security for his election charges; as to the detailed account of the Returning Officer's charges in respect of the election, which must be transmitted by him to the Election Agent within twenty-one days after the return of the elected candidate, see the Parliamentary Elections (Returning Officers) Act, 1875, 38 & 39 Vict. c. 84, s. 4, and the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, s. 32 (2); see also RETURNING OFFICER; and generally as to the expenses of the Returning Officer in connection with the election, see RETURNING OFFICER; see also ELECTION EXPENSES.

*Duties of.*—As to the duties of the Returning Officer with reference to ballot papers and ballot boxes, see BALLOT, and generally as to his duties in connection with the election, see *post*; see also RETURNING OFFICER.

The misconduct of, or irregularities committed by, the Returning Officer in relation to the polling or counting of votes may be the ground of an election petition; as to this, and as to visiting the Returning Officer with costs in certain events, see ELECTION PETITION.

**THE ELECTION.**—*Notice of Election.*—The Returning Officer must, in the case of a county election, within two days after the day on which he receives the writ, and, in case of a borough election, on the day on which he receives the writ or the following day, give public notice between the hours of nine in the morning and four in the afternoon, of the day on which and the place at which he will proceed to an election, of the time appointed for the election, of the day on which the poll will be taken in

case the election is contested, and of the day on which and the time and place at which forms of nomination papers may be obtained. In the case of a county election the Returning Officer must send one of such notices by post, under cover, to the postmaster of the principal post office of each polling place in the county, indorsed with the words "Notice of Election." The notice is to be forwarded free of charge, and the postmaster receiving it must forthwith publish it in the same manner in which post office notices are usually published (Ballot Act, 1872, Sched. I. r. 1).

For form of notice of parliamentary election, see *ibid.* Sched. II.

A notification must be added to the notice of election, to the effect that every person having any claim against a Returning Officer for work, labour, materials, services, or expenses in respect of any contract made with him, by or on behalf of the Returning Officer, for the purposes of the election, must, within fourteen days after the day of the return, send to the Returning Officer written particulars of such claim, and that the Returning Officer is not liable in respect of anything which is not duly stated in the particulars (see the Parliamentary Elections (Returning Officer) Act, 1875, 38 & 39 Vict. c. 84, Sched. II.).

As to notice of the time and place of university elections, see with regard to the Universities of Oxford and Cambridge, the Parliamentary Elections Act, 1793, 33 Geo. III. c. 64; the University of London, the Representation of the People Act, 1867, s. 42; the Scotch Universities, the Representation of the People (Scotland) Act, 1868, s. 37.

If insufficient notice be given, the election would apparently be void (see *Seaford*, 1785, 3 Lud. 3; *Athlone*, 1843, Bar. & Arn. 120; *Rye*, 1848, 1 P. R. D. 113; see, however, Ballot Act, 1872, s. 13; *Longford*, 1870, 2 O'M. & H. 7, and *East Clare*, 1892, 4 O'M. & H. 164).

*Date of Election.*—The day of the election must be fixed by the Returning Officer in the case of an election for a county or a district borough not later than the ninth day after the day on which he receives the writ, with an interval of not less than three clear days between the day on which he gives the notice and the day of election (Ballot Act, 1872, Sched. I. r. 2; as to what are "district boroughs," see the Representation of the People Act, 1832, 2 & 3 Will. IV. c. 45, Sched. E.; Ballot Act, 1872, Sched. I. r. 57; see also the Statute Law Revision (No. 2) Act, 1888, 51 & 52 Vict. c. 57; and the Redistribution of Seats Act, 1885, 48 & 49 Vict. c. 23).

In the case of an election for any borough, other than a district borough, the day of election is to be not later than the fourth day after the day on which the Returning Officer receives the writ, with an interval of not less than two clear days between the day on which he gives the notice and the day of election (Ballot Act, 1872, Sched. I. r. 2).

*Place of Election.*—The place of election in the case of a division of a county must be in such town situate in the county, or in a county of a city or town adjoining the said county, as the local authority having power to divide the division into polling districts (see *post*, under the head *Polling Districts*), or in default of any determination, the Returning Officer, may from time to time determine, as being in their or his opinion the most convenient for the purposes of the election (Redistribution of Seats Act, 1885, 48 & 49 Vict. c. 23, s. 16). The appointment of the place of election is now made by the County Council (see Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 3).

In counties which are not divided, the place of election is, under the Ballot Act, 1872, to be a convenient room situate in the town in which such election would have been held if that Act had not been passed, or



when the election would not have been held in a town, then situate in such town in the county as the Returning Officer may from time to time determine as being in his opinion most convenient for the electors (*ibid.* Sched. I. r. 3; as to the earlier law, see 7 & 8 Will. III. c. 25, s. 3; see also the Sheriffs Act, 1887, 50 & 51 Vict. c. 55, s. 18). The places of election for the counties of Brecknockshire, Radnorshire, and Montgomeryshire were expressly appointed by 27 Hen. VIII. c. 26; as to the Isle of Wight, see the Representation of the People Act, 1832, s. 16.

The above-mentioned provisions of the Ballot Act, 1872, apply to borough elections as well as to county elections, but a more recent enactment provides that in the case of an election for a parliamentary borough, or any division of a parliamentary borough, the place of election is to be such room or rooms in the said borough as the Returning Officer may from time to time determine as being in his opinion the most convenient for the purposes of the election (Redistribution of Seats Act, 1885, s. 16 (2)).

*Time of Election.*—The time appointed for the election is to be such two hours between 10 a.m. and 3 p.m. as may be appointed by the Returning Officer, who must attend during such two hours and for one hour after (Ballot Act, 1872, Sched. I. r. 4).

*The Candidates.*—As to who may be a candidate at a parliamentary election, and as to the incapacities for being elected, and the disqualifications for membership of the House of Commons, see PARLIAMENT; see also Rogers on *Elections*, 17th ed., vol. ii. ch. i. For the statutory definition of the term "candidate," the principles as to the commencement of candidature, and the circumstances under which a candidate may withdraw from candidature, see the article CANDIDATE; see also ELECTION EXPENSES.

*Nomination of Candidates.*—A candidate for election to serve in Parliament for a county or borough must be nominated in writing. The nomination must be subscribed by two registered electors of the county or borough as proposer and seconder, and by eight other electors as assenting to the nomination (see Ballot Act, 1872, s. 1).

The Returning Officer must supply a form of nomination paper to any registered elector requiring the same, during such two hours as the Returning Officer may fix, between 10 a.m. and 2 p.m. on each day, between the day on which notice of the election was given and the day of election, and during the time appointed for the election (*ibid.* Sched. I. r. 7). But any nomination paper may be used provided it is in the prescribed form (*ibid.* Sched. I. r. 7; for form, see *ibid.* Sched. II.).

The nomination papers must be delivered to the Returning Officer at the place of election during the time appointed for the election (*ibid.* Sched. I. r. 8). As soon as a nomination paper is delivered to him the Returning Officer must publish notice of the names of the nominated candidate, and of the proposer and seconder, by placarding them in a conspicuous position outside the building in which the room appointed for the election is situate (*ibid.* Sched. I. r. 11).

At university elections the provisions of the Ballot Act, 1872, do not apply (see s. 31), and the candidates are still, therefore, proposed and seconded orally.

For further information as to the nomination of candidates, see the article NOMINATION.

*Unopposed Election.*—If, at the expiration of one hour after the time appointed for the election, no more candidates stand nominated than there are vacancies to be filled up, the Returning Officer must forthwith declare the nominated candidates to be elected, and return their names to the Clerk

of the Crown in Chancery (Ballot Act, 1872, s. 1). As to the mode of making the return, see *post*, under the head *Return*.

The Returning Officer must, as soon as possible, give public notice of the names of the candidates elected (*ibid.* Sched. I. r. 45); such notice may be given by advertisements, placards, handbills, or such other means as he thinks best calculated to afford information to the electors (*ibid.* Sched. I. r. 46).

*Contested Election*.—If, on the other hand, more candidates stand nominated than there are vacancies to be filled up, the Returning Officer must adjourn the election, and take a poll in accordance with the provisions of the Ballot Act, 1872 (*ibid.* s. 1). As to the effect of the death of one of the nominated candidates after such adjournment of the election before the commencement of the poll, see *ibid.*; see also CANDIDATE.

*THE POLL.—Notice of Poll*.—Where the election is contested the Returning Officer must, as soon as practicable after adjourning the election, give public notice of the day on which the poll will be taken, of the candidates as described in their respective nomination papers, of the names of the persons subscribing the nomination paper of each candidate, and of the order in which the names of the candidates will be printed in the ballot papers (Ballot Act, 1872, Sched. I. r. 9). In the case of a county election the Returning Officer must also deliver to the postmaster of the principal post office of the town in which the place of election is situate a paper signed by himself, containing the names of the nominated candidates, and stating the day on which the poll is to be taken, and the postmaster must forward the information contained in such paper by telegraph free of charge to all the postal telegraph offices in the county for which the election is to be held, and such information must be published forthwith at each office in the manner in which post office notices are usually published (*ibid.* Sched. I. r. 10).

*Polling Districts*.—Every county is to be divided into polling districts, and a polling place must be assigned to each district in such manner that, so far as is reasonably practicable, every elector resident in the county shall have his polling place within a distance not exceeding three miles from his residence. But a polling district need not in any case be constituted containing less than one hundred electors (Corrupt and Illegal Practices Prevention Act, 1883, s. 47 (1)). In every county the local authority, who have power to divide that county into polling districts, must from time to time divide the county into polling districts, and alter these districts and polling places in such manner as may be necessary (*ibid.* s. 47 (2)). This power of dividing the county into polling districts for the purposes of parliamentary elections and of appointing a place of election in each district was vested in the justices of the county in Quarter Sessions (see the Registration Act, 1885, 48 Vict. c. 15, s. 13), but is now transferred to the County Council (Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 3). Such power is not, however, transferred to the council of a "county borough," i.e. a borough which on the 1st June 1888 either had a population of not less than 50,000, or was a county of itself (see *ibid.* ss. 31 and 34 (6)). As to earlier provisions with regard to polling districts in counties, see the Representation of the People Act, 1832, 2 & 3 Will. IV. c. 45, s. 63; the Parliamentary Boundaries Act, 1832, 2 & 3 Will. IV. c. 64; the Representation of the People Act, 1867, 30 & 31 Vict. c. 102, s. 34.

With regard to the division of boroughs into polling districts, the Representation of the People Act, 1867, s. 34, provides that the local

authority of every borough (i.e. the town council of the borough, or in cases where a parliamentary borough is constituted by the combination of two or more municipal boroughs, the town council of that municipal borough in which the nomination takes place) are, if they think convenience requires it, to divide such borough into polling districts. And the local authority may from time to time alter any such district. A description of the polling districts so made or altered must be advertised by the local authority in such manner as they think fit. Under the Parliamentary Electors Registration Act, 1868, § 31 & 32 Vict. c. 58, s. 18, the justices of the peace of the petty sessional division in which the borough is situate are to exercise this power in boroughs where the town council is not the local authority.

The Ballot Act, 1872, s. 5, directs the local authority of every borough to take into consideration the division of the borough into polling districts, and, if they think it desirable, by order to divide the borough into polling districts in such a manner as they may think most convenient for taking the votes of the electors at a poll.

It is further enacted by the Corrupt and Illegal Practices Prevention Act, 1883, s. 47 (3), that the power of dividing a borough into polling districts, vested in a local authority by the Representation of the People Act, 1867, and the enactments amending the same, may be exercised by such local authority from time to time and as often as the authority think fit, and the power is to be deemed to include the power of altering any polling district. And the local authority must from time to time, where necessary for the purpose of carrying the section into effect, divide the borough into polling districts in such manner that every elector resident in the borough shall be enabled to poll within a distance not exceeding one mile from his residence, so, nevertheless, that a polling district need not be constituted containing less than three hundred electors (*ibid.*).

The Registration Act, 1885, s. 13 (4), also requires the local authority having power to divide any parliamentary county or parliamentary borough into polling districts within one month after the passing of the Act, to take into consideration the division of the county or borough into polling districts, and, if necessary, in order to make the districts conform with the enactments relating to the division of counties and boroughs into polling districts, to divide the county or borough or any division of the borough anew into polling districts, and, in a county, assign polling places to such districts in such manner as to make the districts conform with the said enactments, measuring the distance therein mentioned along the nearest road, so as to meet the convenience of electors in recording their votes.

As to how the expenses incurred by the local authority of a county or borough in dividing the county or borough into polling districts are to be defrayed, see the Corrupt and Illegal Practices Prevention Act, 1883, s. 47 (5), and the Registration Act, 1885, s. 14 (1).

*Polling Stations.*—At every contested election for any county or riding, parts, or division of a county, the sheriff, under-sheriff, or sheriff's deputy, must, if required by or on behalf of any candidate, on the day fixed for the election, and if not so required may if it appear to him expedient, cause to be erected a reasonable number of booths for taking the poll at the principal place of election, and also at each of the appointed polling places, and must cause to be affixed on the most conspicuous part of each of the booths the names of the several parishes, townships, and places for which such booth is respectively allotted (Representation of the People Act, 1832, s. 64). The

term "polling booth" now includes polling stations (see the Ballot Act, 1872, s. 15).

The Ballot Act, 1872 (s. 8 and Sched. I. r. 15), requires the Returning Officer to provide at every polling place a sufficient number of polling stations for the accommodation of the electors entitled to vote at such polling place, and to distribute the polling stations amongst those electors in such manner as he thinks most convenient.

Each polling station must be furnished with such number of compartments, in which the voters can mark their votes screened from observation, as the Returning Officer thinks necessary, but at least one compartment must be provided for every hundred and fifty electors entitled to vote at such polling station (Ballot Act, 1872, Sched. I. r. 16). A separate room or separate booth may contain a separate polling station, or several polling stations may be constructed in the same room or booth (*ibid.* r. 17).

The Returning Officer must give public notice of the situation of the polling stations, and the description of voters entitled to vote at each station, and of the mode in which electors are to vote (*ibid.* r. 19), and no person, except, under some circumstances, a police constable on duty, is to be admitted to vote at any polling station except the one allotted to him (*ibid.* r. 18; see also the Police Disabilities Removal Act, 1887, 50 Vict. c. 9).

With regard to boroughs, the Representation of the People Act, 1867, s. 34, required the Returning Officer, in the case of a contested election, to provide at least one booth or room for taking the poll in each polling district. The earlier enactment, 9 Geo. IV. c. 59, regulating the mode of taking the poll at borough elections was repealed by the Statute Law Revision Act, 1861, 24 & 25 Vict. c. 101. Under the Ballot Act, 1872, the same rules now regulate polling stations in boroughs as in counties. In a district borough there must be at least one polling station at each contributory place of such borough (Ballot Act, 1872, Sched. I. r. 15).

At every contested election for any county or borough, unless some building or place belonging to the county or borough is provided for the purpose of taking the poll, the Returning Officer must, whenever it is practicable, hire a building or room instead of erecting a booth (Representation of the People Act, 1867, s. 37). Moreover, the Returning Officer at a parliamentary election is entitled to use, free of charge for the purpose of taking the poll, any room in a school receiving a grant out of moneys provided by Parliament, and any room the expense of maintaining which is payable out of any local rate, but he must make good any damage done to such room, and defray any expense incurred by the persons having control of it on account of its being used for the purpose of taking the poll (Ballot Act, 1872, s. 6). No poll at any election may, however, be taken at any inn, hotel, tavern, public-house, or other premises licensed for the sale of beer, wine, or spirits, or in any room or other place directly communicating therewith, except by the written consent of all the candidates (Parliamentary Elections Act, 1853, 16 & 17 Vict. c. 68, s. 6), and no election for any city or borough may be held in any church, chapel, or other place of public worship (Representation of the People Act, 1832, s. 68).

In the City of London the Returning Officer must take the poll of voters of such freemen of the city being liverymen of the several companies, as are entitled to vote, at the Guildhall, and is not required to provide any booth or compartment, but is to take one poll for the whole number of such liverymen at the same place (Parliamentary Voters Registration Act, 1843, 6 & 7 Vict. c. 18, s. 92).

With respect to university elections, at every election for the Univer-

sities of Oxford and Cambridge the Vice Chancellor has power to appoint any number of polling places not exceeding three in addition to the House of Convocation or Senate House, and to direct at which of the polling places the members of convocation and of the senate according to their colleges are to vote, and also to appoint any number of pro-Vice Chancellors to receive the votes and decide upon all questions in the absence of the Vice Chancellor, and to appoint poll clerks to enter the votes in poll books (Parliamentary Elections Act, 1853, s. 5).

At elections for the University of London the Vice Chancellor must appoint the polling place, and also has power to appoint pro-Vice Chancellors (see the Representation of the People Act, 1867, s. 44).

As to the cost of the erection of polling booths or polling stations, see the Representation of the People Act, 1832, s. 71, and the Parliamentary Elections (Returning Officers) Act, 1875, 38 & 39 Vict. c. 84, s. 2, and Sched. I.

*Presiding Officers.*—The Returning Officer must appoint a presiding officer to preside at each polling station (Ballot Act, 1872, Sched. I. r. 21). The Returning Officer may, however, if he think fit, preside at any polling station, and in such case has the duties of presiding officer (see *ibid.* r. 47). It is the duty of the presiding officer to keep order at his polling station, to regulate the number of electors to be admitted at a time, and to exclude all other persons except the clerks, the agents of the candidates, and the constables on duty (*ibid.* r. 21). A candidate at the election has also the right to be present in a polling station during the election (see *Clementson v. Mason*, 1875, L. R. 10 C. P. 209). Any person misconducting himself in a polling station, or failing to obey the orders of the presiding officer, may by order of the presiding officer be immediately removed by a constable, or by any other person authorised in writing by the Returning Officer, and will not without the permission of the presiding officer again be allowed to enter the polling station during the day; but these powers are not to be exercised so as to prevent any elector entitled to vote at any polling station from having an opportunity of doing so (Ballot Act, 1872, s. 9).

*Polling Clerks.*—The Returning Officer has power to appoint and pay such officers as may be necessary for effectually conducting the election (see *ibid.* s. 8). He has, therefore, power to appoint polling clerks to attend at the polling stations. One clerk may be appointed at each polling station to which not more than five hundred voters are assigned, and an additional clerk for every five hundred voters or fraction of that number beyond the first five hundred assigned to such polling station (Parliamentary Elections (Returning Officers) Act, 1875, 38 & 39 Vict. c. 84, Sched. I.). The clerks appointed to assist the presiding officer have power to do any act which he is required or authorised to do at a polling station, except ordering the arrest, exclusion, or ejection from the polling station of any person (Ballot Act, 1872, Sched. I. r. 50).

No person can be appointed by the Returning Officer as presiding officer or as polling clerk, or for any other purpose of the election, who has been employed by any other person in or about the election (*ibid.* r. 49).

As to the payment of presiding officers and polling clerks, see the Parliamentary Elections (Returning Officers) Act, 1875, 38 & 39 Vict. c. 84, Sched. I.; and the Parliamentary Elections (Returning Officers) Act, 1885, 48 & 49 Vict. c. 62, s. 4.

*Polling Agents, etc.*—Any candidate at a parliamentary election may previous to the time fixed for taking the poll nominate and appoint agents on his behalf to attend at each or any of the polling booths for the purpose

of detecting personation; notice in writing of the names and addresses of such agents must be given by the candidate to the Returning Officer or his deputy, after which such agents may attend at the polling booths for which they have been appointed (Parliamentary Voters Registration Act, 1843, 6 & 7 Vict. c. 18, s. 85).

Every polling agent employed for payment must now be appointed by the Election Agent by himself or by his sub-agent (see Corrupt and Illegal Practices Prevention Act, 1883, s. 27 (1)). As to the appointment of the Election Agent and his sub-agents, see ELECTION AGENT; see also AGENCY, ELECTION. Only one polling agent in each polling station may be employed for payment (see Corrupt and Illegal Practices Prevention Act, 1883, s. 17, and Sched. I. Part I. (3)).

A candidate may himself undertake the duties which any agent of his if appointed might have undertaken, or may assist his agent in the performance of such duties (see Ballot Act, 1872, Sched. I. r. 51).

*Date of Poll.*—The poll must take place on the day appointed by the Returning Officer, which, in the case of an election for a county or district borough, must not be less than two nor more than six clear days, and, in the case of an election for a borough, other than a district borough, not more than three clear days after the day fixed for the election (*ibid.* Sched. I. r. 14).

*Duration of Poll.*—The poll at parliamentary elections, other than university elections, must commence at 8 a.m., and be kept open until 8 p.m. of the same day and no longer (the Elections (Hours of Poll) Act, 1885, 48 Vict. c. 10). An irregularity on the part of the Returning Officer in not opening the poll at the proper time, or closing the poll for a short time, will not invalidate the election unless the result of the election can be shown to have been thereby affected (see *Drogheda*, 1874, 2 O'M. & H. 202; *Worcester*, 1880, 3 O'M. & H. 187; *East Clare*, 1892, 4 O'M. & H. 163; and see the Ballot Act, 1872, s. 13).

The polling at elections for the Universities of Oxford and Cambridge is not to continue for more than five days (Parliamentary Elections Act, 1853, s. 4). There is a similar limit in the case of elections for the University of London (see Representation of the People Act, 1867, s. 43). See also the Parliamentary Elections Act, 1785, 25 Geo. III. c. 84, s. 3, as to the time of polling at university elections; and as to the duration of the poll at Scotch universities, see the Universities Elections Amendment (Scotland) Act, 1881, 44 & 45 Vict. c. 40, s. 2.

*Voting at the Poll.*—Since the introduction of the system of secret voting by the Ballot Act, 1872, in the case of a poll at an election the votes must be given by ballot (see Ballot Act, 1872, s. 2).

For information as to the mode of voting by ballot, including details as to the form and contents of the ballot papers and counterfoils, the official mark which is to be stamped on each ballot paper immediately before being delivered to the voter, the marking of the vote on the ballot paper and placing it in the ballot box by the voter, the various offences relating to ballot papers and ballot boxes, and the duties of the Returning Officer or presiding officer with regard to the ballot papers and ballot boxes, see the article **BALLOT**.

The system of voting by ballot is in every detail regulated by the provisions of the Ballot Act, 1872, and the rules and forms contained in the schedules to the Act. The provisions of the Ballot Act, 1872, must be absolutely obeyed, but the rules and forms contained in the schedules are merely directory, and, provided they are substantially obeyed, it is not

essential to follow them in every detail, and non-compliance with the rules or mistake in the use of the forms will not invalidate an election if the election was conducted in accordance with the principles laid down in the body of the Act (see s. 13; see also *Woodward v. Sarsons*, 1875, L. R. 10 C. P. 746; *Philipps v. Goff*, 1886, 17 Q. B. D. 812; *Thornbury*, 1886, 16 Q. B. D. 739; *East Clare*, 1892, 4 O'M. & H. 163).

No inquiry is allowed to be made of any voter at the time of polling as to his right to vote, excepting that the Returning Officer or his deputy may put to any voter, at the time of tendering his vote but not afterwards, questions (1) as to the identity of the voter, and (2) as to whether he has already voted at the election. The voter may be required to answer these two questions, or either of them, on oath; the oath may be administered by the Returning Officer, his deputy or clerk, or the presiding officer (see the Parliamentary Voters Registration Act, 1843, s. 81; the Redistribution of Seats Act, 1885, s. 13 (4), and the Ballot Act, 1872, s. 10). For form of oath, and of the two questions, see the Parliamentary Voters Registration Act, 1843, s. 81; and for form of the second question in the case of boroughs divided into divisions, see the Redistribution of Seats Act, 1885, s. 13 (4); see also the article **BALLOT**.

As to the circumstances under which the Returning Officer has power to reject any vote tendered by any person whose name is on the register of voters, and generally as to tendered votes, see **BALLOT**; see also **SCRUTINY**.

As to the offence of personation at the poll, giving the offender into custody, prosecution by the Returning Officer, and the penalties and incapacities consequent thereon, see under the head *Personation* in the article on **CORRUPT PRACTICES**.

*The Poll at University Elections.*—The mode of election at common law was by the view, i.e. by a holding up of hands, or by the voice of the electors present (see per Brook, C.J., *Buckley v. Rice Thomas*, 1554, Plowd. at p. 128; see also Simeon, *Law of Elections*, 2nd ed., p. 154; Heywood on *County Elections*, 2nd ed., p. 354); but a poll or numeration of the votes, man by man, had to be taken if demanded by a candidate, or by an elector (see Coke, *Inst.* iv. 48; Roe, *Law of Elections*, 2nd ed., vol. i. p. 577; Simeon, *Law of Elections*, 2nd ed., p. 156; Heywood on *County Elections*, 2nd ed., p. 358; Southwark, *Glanv.* 8; *R. v. Brightwell*, 1839, 10 Ad. & E. at p. 177). But at the present time under the Ballot Act, 1872, a poll must in the case of every contested election be taken by ballot, and no demand is necessary.

In the case of university elections, however, the provisions of the Ballot Act, 1872, do not apply (see s. 31), and with regard to such elections the old law is still in force. At university elections, therefore, if the number of candidates proposed and seconded is in excess of the number of vacancies, the Returning Officer must call for a show of hands, and the candidate in whose favour it is elected, unless a poll be demanded, in which event the election must be adjourned in order to take a poll. The poll at university elections may be by means of oral voting or by means of voting papers. The Universities Elections Acts, 1861 and 1868 (extended to the University of London by the Representation of the People Act, 1867, s. 45), enable electors at university elections, instead of attending to vote in person, to nominate any other electors of the same university to deliver for them at the poll voting papers containing their votes. Every such voting paper is to bear date subsequently to notice given by the Returning Officer of the day for proceeding to election, and to contain the names of the candidates thereby voted for, and the names of the electors authorised on behalf of the voter to tender such voting paper at the poll, and must be according to the form

or to the effect prescribed in the schedule to the University Elections Act, 1861 (see s. 1 of that Act). Such voting paper, the date and names being previously filled in, must, on any day subsequent to the notice of election, be signed by the voter in the presence of a justice of the peace for the county or borough in which the voter is then residing; the justice of the peace must certify and attest the fact of the voting paper having been so signed in his presence by signing at the foot of it a certificate or attestation in the prescribed form, with his name and address in full (*ibid.* s. 1, and the schedule). As to the officers in whose presence voting papers may be signed in the Channel Islands, see the Universities Elections Act, 1868, 31 & 32 Vict. c. 65, s. 3. The voting papers so signed and certified may be delivered to the Returning Officer of the university or his deputy, at any of the appointed polling places, during the appointed hours of polling, by any one of the persons therein nominated in that behalf, who on tendering such voting paper at the poll is to read out the same, and the Returning Officer must receive the voting papers as delivered, and cause the votes to be recorded as if the votes had been given by the electors attending in person, and all votes so recorded are to have the same validity and effect as if given by the voters in person (the University Elections Act, 1861, s. 2). No person, however, may vote by more than one voting paper at any election, and no voting paper containing the names of more candidates than there are burgesses to be elected at the election is to be received or recorded (*ibid.*). No voting paper is to be received or recorded unless the person tendering it makes and signs at the foot or back of the paper a declaration that he believes it to be the paper by which the voter intends to vote pursuant to the provisions of the Universities Elections Acts, 1861 and 1868 (see s. 2 of the Act of 1861 and s. 1 of the Act of 1868). Moreover, no voting paper is to be received or recorded if the voter signing it has already voted in person at the same election; but every elector may vote in person notwithstanding that he has signed and transmitted a voting paper to another elector if his voting paper has not been already tendered at the poll (see University Elections Act, 1861, s. 2). As to inspection of such voting papers by any person entitled to object to the votes, as to the filing of the voting papers, and as to the penalty for falsely or fraudulently signing any voting paper in the name of any other person, etc., see *ibid.* ss. 3-5. As to the Scotch Universities, see the Representation of the People (Scotland) Act, 1868, 31 & 32 Vict. c. 48; and the Universities Elections Amendment (Scotland) Act, 1881, 44 & 45 Vict. c. 40, under sec. 2 of which Act electors, in the case of Scotch university elections, can only vote by means of voting papers and not in person.

*Adjournment of Poll.*—Where the taking of the poll at any election is interrupted or obstructed by any riot or open violence, the Returning Officer or his deputy may not finally close the poll, but must adjourn the taking of the poll at the particular polling places at which the interruption or obstruction happened until the following day, and if necessary he must further adjourn the poll until the interruption or obstruction has ceased (the Parliamentary Elections Act, 1835, 5 & 6 Will. IV. c. 36, s. 8). Where the poll is so adjourned by any deputy or presiding officer, he must give notice to the Returning Officer, who is not to finally declare the state of the poll until the poll is finally closed (see *ibid.*). See also the Parliamentary Elections (Polling) Act, 1853, 16 & 17 Vict. c. 15, s. 3; *Cork*, 1853, 2 Pow. R. & D. 234; *Colchester*, 1789, 1 Peck. 503; *Roxburgh*, 1838, Falc. & Fitz. 475; *Warrington*, 1869, 1 O'M. & H. 43; *Worcester*, 1880, 3 O'M. & H. 184.

*Proceedings at close of Poll.*—After the close of the poll the ballot boxes



are to be sealed up so as to prevent the introduction of additional ballot papers (see Ballot Act, 1872, s. 2). The presiding officer of each station, as soon as possible after the close of the poll, is, in the presence of the agents of the candidates, to make up into separate packets, sealed with his own seal and the seals of such agents of the candidates as desire to affix their seals—(1) each ballot box in use at his station unopened, but with the key attached; (2) the unused and spoilt ballot papers (see *BALLOT*), packed together; (3) the tendered ballot papers (see *BALLOT*); (4) the marked copy of the register of voters, and the counterfoils of the ballot papers; and (5) the tendered votes list, and the list of votes marked by the presiding officer, and a statement of the number of the voters whose votes are so marked by the presiding officer under the heads “physical incapacity,” “Jews,” and “unable to read,” and the declarations of inability to read (see *BALLOT*). These packets are to be delivered to the Returning Officer (Ballot Act, 1872, Sched. I. r. 29). With these packets the presiding officer is to send a statement showing the number of ballot papers intrusted to him, and accounting for them under the heads of ballot papers in the ballot boxes, unused, spoilt, and tendered ballot papers; this statement is known as the “ballot paper account” (*ibid.* r. 30).

It is the duty of the Returning Officer to make arrangements for counting the votes in the presence of the agents of the candidates as soon as practicable after the close of the poll, and he must give notice in writing of the time and place at which he will begin to count them to the agents of the candidates appointed to attend at the counting of the votes (*ibid.* r. 32).

**COUNTING THE VOTES.—*Agents for Counting Votes.***—The candidates may respectively appoint agents to attend the counting of the votes (Ballot Act, 1872, Sched. I. r. 31). The name and address of every agent of a candidate appointed to attend the counting of the votes must be sent to the Returning Officer one clear day at least before the opening of the poll; the Returning Officer may refuse to admit to the place where the votes are counted any agent whose name and address has not been so transmitted, notwithstanding that his appointment may be otherwise valid (*ibid.* r. 52).

If any person appointed by a candidate as agent for the purposes of attending at the polling station, or at the counting of the votes dies, or becomes incapable of acting, during the election, another agent may be appointed in his place by the candidate, and notice of the name and address of the agent so appointed must be sent to the Returning Officer (*ibid.* r. 53). The non-attendance of any agent would not, however, invalidate the counting (*ibid.* r. 55).

***Procedure on Counting Votes.***—At the time appointed the Returning Officer must open the ballot boxes, and ascertain the result of the poll, by counting the votes given to each candidate (see Ballot Act, 1872, s. 2). The Returning Officer, his assistants and clerks, the agents of the candidates, and the candidates themselves, are the only persons who may be present at the counting of the votes, unless the Returning Officer sanctions the presence of anyone else (see *Clementson v. Mason*, 1875, L. R. 10 C. P. 269; and Ballot Act, 1872, Sched. I. r. 33). The Returning Officer has power to appoint competent persons to assist him in counting the votes, but no one employed by any other person in or about the election may be appointed to assist at the count (see *ibid.* rr. 48 and 49).

Before the Returning Officer proceeds to count the votes, he must, in the presence of the agents of the candidates, open each ballot box, and taking

out the papers therein count and record the number thereof, and then mix together the whole of the ballot papers contained in the ballot boxes. While counting and recording the number of ballot papers and counting the votes, the Returning Officer must keep the ballot papers with their faces upwards, and take all proper precautions for preventing anyone from seeing the numbers printed on the backs of the papers (*ibid.* r. 34; see also *Ackers v. Howard (Thornbury)*, 1886, 16 Q. B. D. at p. 750). He must, so far as practicable, proceed continuously with the counting of the votes, allowing only time for refreshment, and, unless he and the agents otherwise agree, excluding the hours between 7 p.m. and 9 a.m. During any adjournment of the counting, the Returning Officer must place the ballot papers, and other documents relating to the election, under his seal, and the seals of any of the agents who desire to affix their seals, and must otherwise take proper precautions for the security of the ballot papers and documents (Ballot Act, 1872, Sched. I. r. 35).

Tendered ballot papers are not to be counted by the Returning Officer (*ibid.* r. 27); as to these, see **BALLOT**; see also **SCRUTINY**.

• *Rejection of Ballot Papers.*—Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the number on the back is written or marked by which the voter can be identified, is void, and must not be counted (Ballot Act, 1872, s. 2). While counting the votes the Returning Officer must indorse "rejected" on the back of any ballot paper which he may reject as invalid, and if an objection be made to his decision by any agent, he must add to the indorsement the words "rejection objected to" (*ibid.* Sched. I. r. 36; see also *Ackers v. Howard (Thornbury)*, 1886, 16 Q. B. D. at p. 751). The Returning Officer must report to the Clerk of the Crown in Chancery the number of ballot papers rejected, and not counted by him, under the several heads of: want of official mark; voting for more candidates than entitled to; writing or mark by which voter could be identified; unmarked, or void for uncertainty; and must on request allow any agents of the candidates, before such report is sent in, to copy it (Ballot Act, 1872, Sched. I. r. 36).

Votes which are bad upon any other grounds than those specified cannot be rejected by the Returning Officer, but will be struck off on a scrutiny (see *Pritchard v. Mayor, etc., of Bangor*, 1888, 13 App. Cas. 241; see also **SCRUTINY**).

For the principles as to the validity of ballot papers, see the article **BALLOT**; see also **SCRUTINY**. For facsimiles of ballot papers upon which there have been express decisions, see *Rogers on Elections*, 17th ed., vol. ii. pp. 130–135, and *Parker, Election Agent and Returning Officer*, 2nd ed., pp. 257–272.

The decision of the Returning Officer as to any question arising in respect of any ballot paper is final, subject to reversal on petition questioning the election or return (Ballot Act, 1872, s. 2; see also **ELECTION PETITION**; **SCRUTINY**).

*Equality of Votes, Casting Vote.*—Where on counting the votes an equality of votes is found to exist between any candidates at the election, and the addition of a vote would entitle any of the candidates to be declared elected, the Returning Officer, if a registered elector of the county or borough in respect of which the election is held, may give such additional vote (Ballot Act, 1872, s. 2). But, although the Returning Officer has this casting vote, he is not in any other case entitled to vote at

an election for which he is returning officer (see *ibid.*; see also the article CASTING VOTE).

*Miscount and Recount.*—A miscount of the ballot papers is ground for the presentation of an election petition (see *Renfrew*, 1874, 2 O.M. & H. 213; *Greenock*, 1892, Day's El. Cas. 21; *Halifax*, 1893, 4 O.M. & H. 203; see also ELECTION PETITION). As to the procedure on a recount of the ballot papers, which has by order frequently been held before the trial in recent petitions (e.g. *Shoreditch*, 1896, 5 O.M. & H. 69; *Tower Hamlets*, 1896, *ibid.* 89), see the article RECOUNT.

*Verification of Ballot Paper Accounts.*—Upon the completion of the counting the Returning Officer must seal up in separate packets the counted and rejected ballot papers. He must not open the sealed packet of tendered ballot papers or marked copy of the register of voters and counterfoils, but is to proceed, in the presence of the agents of the candidates, to verify the ballot paper account given by each presiding officer, by comparing it with the number of ballot papers recorded by him, and the unused and spoilt ballot papers in his possession and the tendered votes list, and he is to reseal each sealed packet after examination (Ballot Act, 1872, Sched. I. r. 37). The Returning Officer must report to the Clerk of the Crown in Chancery the result of such verification, and must, on request, allow any agents of the candidates, before such report is sent in, to copy it (*ibid.*).

*Subsequent Custody of Ballot Papers.*—Lastly, the Returning Officer must forward all the packets of ballot papers, and of counterfoils, the ballot paper accounts, tendered votes list and other documents relating to the election, to the Clerk of the Crown in Chancery (see *ibid.* r. 38). As to the mode of forwarding such documents, as to the duties of the Clerk of the Crown in connection with them, and as to their inspection or production, see *ibid.* rr. 38–43; see also the article BALLOT.

*Secrecy of the Ballot.*—Every Returning Officer, and every officer, clerk, or agent, authorised to attend at a polling station, or at the counting of the votes, must before the opening of the poll make a statutory declaration of secrecy (Ballot Act, 1872, Sched. I. r. 54). The Returning Officer must make this declaration before a justice of the peace; any other officer or an agent may make it before a justice of the peace or the Returning Officer (*ibid.*). For form of the statutory declaration of secrecy, see Ballot Act, 1872, Sched. II.

Every officer, clerk, and agent in attendance at a polling station must maintain and aid in maintaining the secrecy of the voting in the polling station, and must not communicate, except for any purpose authorised by law, before the poll is closed, to any person, any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper, or voted at that polling station, or as to the official mark (Ballot Act, 1872, s. 4). And there must be no interference with or attempt to interfere with a voter when marking his vote, or attempt to obtain in the polling station information as to the candidate for whom any voter is about to vote or has voted, nor may there be any communication to any person of any information obtained in a polling station as to the candidate for whom any voter in the polling station is about to vote or has voted, or as to the number on the back of the ballot paper given to any voter at the polling station (*ibid.*). Every officer, clerk, and agent in attendance at the counting of the votes, also, must maintain secrecy as to the voting, and must not make any attempt at the counting to ascertain the number on the back of any ballot paper, or communicate any informa-

tion obtained at the counting as to the candidate for whom any vote is given in any particular ballot paper (*ibid.*). No person may directly or indirectly induce any voter to display his ballot paper after he has marked it, so as to make known to any person the name of the candidate for or against whom he has marked his vote (*ibid.*). Anyone contravening these provisions as to the secrecy of the ballot is liable on summary conviction to imprisonment for any term not exceeding six months with or without hard labour (*ibid.*).

Moreover, violations of the Ballot Act, and irregularities with regard to the poll or counting of the votes, will afford ground for an election petition (see *Warrington*, 1869, O'M. & H. 43; *Drogheda*, 1874, 2 O'M. & H. 201; *Worcester*, 1880, 3 O'M. & H. 184; *East Clare*, 1892, 4 O'M. & H. 163; *Cirencester*, 1893, *ibid.* 194; see also the article ELECTION PETITION.

**DECLARATION OF ELECTION.**—As soon as the counting of the votes has been completed, and the result of the poll consequently ascertained, the Returning Officer must forthwith declare to be elected the candidate or candidates to whom the majority of votes have been given (see the Ballot Act, 1872, s. 2), and must as soon as possible give public notice of the names of the candidates elected, and of the total number of votes given for each candidate whether elected or not.

In the case of elections at the Universities of Oxford and Cambridge the names of the persons elected must be declared immediately or on the day next after the close of the poll (see the Parliamentary Elections Act, 1785, 25 Geo. III. c. 84, s. 1); and at an election at the University of London the declaration of the state of the poll and proclamation of the member chosen must be made not later than two o'clock in the afternoon of the day next following the close of the poll (see the Representation of the People Act, 1867, s. 44).

Where the votes are equal and the Returning Officer is not a registered elector of the county or borough in respect of which the election is held, or if, being a registered elector, he does not exercise his casting vote, he must declare all the candidates having an equal number of votes to be duly elected (see *post*, under the head *Double Return*; see also Rogers on *Elections*, 17th ed., vol. ii. p. 136). The declaration of the name or names of the person or persons who have the majority of votes was expressly required by the Parliamentary Elections Act, 1785, 25 Geo. III. c. 84. Where, however, on a scrutiny the votes are found to be equal, the election is void (see *Appleby*, 1756, 27 Com. Journ. 443; *Downton*, 1785, 1 Lud. 264; see also the article SCRUTINY).

**THE RETURN.**—It is the duty of the Returning Officer immediately the result of the poll is ascertained to return the names of the elected candidate or candidates to the Clerk of the Crown in Chancery (see Ballot Act, 1872, s. 2).

**Mode of making Return.**—The return of a member or members elected to serve in Parliament for any county or borough is now made by means of a certificate of the names of such member or members, under the hand of the Returning Officer, indorsed on the writ of election for the county or borough (*ibid.* Sched. I. r. 44; for form of certificate, see *ibid.* Sched. II.). As to the earlier law with regard to the mode of making the return, in the case of county elections, see 7 Hen. IV. c. 15; and in the case of borough elections, see 2 Whitelocke, 403, and the Parliamentary Elections Act, 1853, 16 & 17 Vict. c. 68. See also Roe, *Law of Elections*, 2nd ed., vol. i. pp. 723.

845. The Ballot Act, 1872, provides that such certificate is to have effect and be dealt with in like manner as the return under the existing law (*ibid.* Sched. I. r. 44). The Returning Officer may, if he think fit, deliver the writ with such certificate indorsed to the postmaster of the principal post office of the place of election, or his deputy, and in that case he is to take a receipt from the postmaster or his deputy, for the same, and it is to be forwarded by the first post free of charge under cover to the Clerk of the Crown, with the words "Election Writ and Return" indorsed thereon (*ibid.*). The Clerk of the Crown is required to enter in a book to be kept for that purpose every return which comes to his hands, and also every alteration and amendment which may be made by him or his deputy in any such return (see 7 & 8 Will. III. c. 7, s. 5). All persons are to have free access to the book in which the returns are so entered, and may take copies of any entries, upon payment of a reasonable fee (*ibid.*).

The return of a member to serve in Parliament is made so soon as the writ with the certificate of the Returning Officer indorsed thereon reaches the hands of the Clerk of the Crown in Chancery, but until then is not complete (see *Hurdle v. Waring (Poole)*, 1874, L. R. 9 C. P. 435).

*Double Return.*—The Returning Officer has now no discretion as to the return, but is obliged to return the candidate having the majority of votes; in the case of two or more candidates having an equality of votes, unless he is entitled to give and does give a casting vote as stated above, he must make a double return, *i.e.* return them all as duly elected (see *Helston*, 1866, 121 Com. Journ. 486). But for wilfully, falsely, and maliciously returning more persons than are required to be chosen by the writ, a returning officer is liable to statutory penalties (see 7 & 8 Will. III. c. 7, s. 3; at common law, however, no action would lie in such a case, see *Barnardiston v. Soame*, 1674, 2 St. Tri. 1063; and *Prideaux v. Morrice*, 1702, 7 Mod. 14). Where there is a double return two certificates are indorsed on the writ, and both the names are entered in the return books. Though both members can claim to take their seats, neither of them can vote until the right to the seat has been determined (see May, *Parliamentary Practice*, 10th ed., p. 615). Double returns are recognised by the Parliamentary Elections Act, 1785, 25 Geo. III. c. 84; see also *Montgomery*, 1848, 103 Com. Journ. 218; *Knaresborough*, 1853, 2 Pow. R. & D. 211. See further as to double returns, Roe, *Law of Elections*, 2nd ed., pp. 796–804; May, *Parliamentary Practice*, 10th ed., p. 615.

*Special Return.*—In some few cases, *e.g.* where elections have been interfered with by rioting, special returns have been made by the Returning Officer (see *Denbighshire*, 1601, D'Ewes, 627; *Leicestershire*, 1714, 18 Com. Journ. 21; *Coventry*, 1780, 38 *ibid.* 8; *Knaresborough*, 1805, 2 Peck. 382; see also Roe, *Law of Elections*, 2nd ed., pp. 784–790); but an adjournment of the poll in such case is, as above stated, provided for by statute.

*Delay in making Return, etc.*—If the Returning Officer wilfully delays, neglects, or refuses to return any person who ought to be returned, he is liable, where it has been determined on the hearing of an election petition that such person was entitled to have been returned, to an action at the suit of such person for double damages; such action must be commenced within a year after the commission of the act on which it is grounded or within six months after the conclusion of the trial of the election petition (Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125, s. 48). Moreover, the House of Commons also has jurisdiction to punish the Returning Officer in case of his wilfully refusing or neglecting to make a return (see May, *Parliamentary Practice*, 10th ed., p. 602).

*Amendment of Return.*—The return having once been made by the

Returning Officer to the Clerk of the Crown, it cannot be altered or amended, except by order of the House of Commons (see 10 Com. Journ. 377; see also 7 & 8 Will. III. c. 7, s. 5). If a candidate has been duly elected, but not duly returned, he cannot sit in the House of Commons until the return has been amended, which would be ordered to be done in such a case (see *Chippenham*, 1625, Glanv. 59; *Montgomery*, 1848, 103 Com. Journ. 218).

Where, in fact, there is any error in the return, *e.g.* a mistake in the name of the member returned, in the date of the return, or in the division of the county for which the return is made, the House of Commons upon being informed thereof will order the Clerk of the Crown to attend and amend the return (see May, *Parliamentary Practice*, 10th ed., p. 602).

The undue return or the undue election of a member affords ground for the presentation of an election petition (see the article ELECTION PETITION). After the trial of an election petition the House of Commons, on being informed by the Speaker of the certificate and reports (if any) of the election judges, must give the necessary directions for confirming or altering the return, or for issuing a writ for a new election, or for carrying the determination into execution, as circumstances may require (see Parliamentary Elections Act, 1868, s. 13). Where, therefore, the election judges, on the trial of an election petition, determine that the respondent was not duly elected, the House of Commons will, upon the return being brought before it by the Clerk of the Crown, amend the return by substituting the name of the candidate who was duly elected and ought to be returned.

See further as to the amendment of the return, Roe, *Law of Elections*, 2nd ed., pp. 815–821, and May, *Parliamentary Practice*, 10th ed., p. 602.

GENERAL.—The limit of space precludes the possibility of presenting in this article any historical account of the law relating to parliamentary elections. As to the history of the subject, in addition to such sources of information as the Journals of the House of Commons, Hansard's *Parliamentary Debates*, the decisions of the old Election Committees as reported in the various reports of Election Cases, and the works of Stubbs, Hallam, and May on the history of the English Constitution, reference should be made to the authorities mentioned below.

See BALLOT; CANDIDATE; CORRUPT PRACTICES; ELECTION AGENT; ELECTION EXPENSES; ELECTION PETITION; FRANCHISE; ILLEGAL PRACTICES; RECOUNT; RETURNING OFFICER; SCRUTINY.

[*Authorities.*—Carew, *Historical Account of the Rights of Elections*, 1755; Whitelocke on the *King's Writ for Choosing Members of Parliament*, 1766; Simeon, *Treatise on the Law of Elections*, 2nd ed., 1795; Heywood, *Law of Borough Elections*, 1797; Heywood, *Law of County Elections*, 2nd ed., 1812; Orme, *Digest of the Election Laws*, 2nd ed., 1812; Hatsell, *Precedents of Proceedings in the House of Commons*, 4th ed., 1818; Roe, *Law of Elections*, 2nd ed., 1818; May, *Parliamentary Practice*, 10th ed., 1893; Rogers on *Elections*, 17th ed., 1895, vol. ii. (Parliamentary).]

## II. MUNICIPAL AND OTHER ELECTIONS.

### MUNICIPAL ELECTIONS.

INTRODUCTORY.—The foundation of the present law relating to municipal elections is the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50,

which consolidated and amended the previous enactments relating to municipal corporations in England and Wales, and Part III. of which regulates the preparations for municipal elections and the procedure at such elections.

**MEANING OF MUNICIPAL ELECTION.**—A municipal election, as defined by statute, means an election to a corporate office, *i.e.* the office of Mayor, Alderman, Councillor, or Elective Auditor (see the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 7 (1)).

The council of a borough, by means of which the municipal corporation of the borough exercises its corporate powers, consists of the mayor, aldermen, and councillors (see Mun. Corp. Act, 1882, s. 10). Two auditors, called elective auditors, are also elected annually to audit the accounts of the council (see *ibid.* s. 25). As to the qualifications and disqualifications for being elected to the offices of mayor, alderman, councillor, and elective auditor, see Rogers on *Elections*, 17th ed., vol. iii. pp. 3-18; see also the articles ALDERMEN; AUDITOR; MAYOR; MUNICIPAL CORPORATION; MUNICIPAL COUNCIL.

**VACANCIES OCCASIONING ELECTION.**—Municipal elections take place in consequence of ordinary vacancies, which occur when the various municipal officers go out of office by efflux of time in due course. Thus the term of office of the mayor is one year, which expires on the 9th of November in each year, but the mayor continues in office until his successor has accepted office and made and subscribed the required declaration (see the Mun. Corp. Act, 1882, s. 15 (1) and (3) and s. 61 (1)). The term of office of an alderman is six years, and on the 9th of November in each year one-half of the whole number of aldermen, *viz.* those who have been aldermen for the longest time without re-election, go out of office, and their places must be filled by election (see *ibid.* s. 14 (5) (6) and (7) and s. 60 (1)). The term of office of a councillor is three years, and on the 1st of November in every year one-third of the whole number of councillors for the borough or ward as the case may be, *viz.* those councillors who have been longest in office without re-election, go out of office, and their places must be filled by election (see *ibid.* ss. 13 and 52). The term of office of an auditor is one year, and each auditor goes out of office on the 1st of March in every year, or such other day as the council, with the approval of the Local Government Board, from time to time appoint (see *ibid.* s. 25 (4) and s. 62 (1)).

Municipal elections also take place in consequence of casual vacancies which may occur in various ways, as to which see Rogers on *Elections*, 17th ed., vol. iii. pp. 33-36; see also the article MUNICIPAL CORPORATION. On a casual vacancy in a corporate office an election must be held by the same persons and in the same manner as an election to fill an ordinary vacancy; and the person elected is to hold office until the time when the person in whose place he is elected would regularly have gone out of office, and he is then to go out of office. The election in such case must be held within fourteen days after notice in writing of the vacancy has been given to the mayor or town clerk by two burgesses (Mun. Corp. Act, 1882, ss. 40 (1) and 66 (1)). When the office vacant is that of mayor the notice of the meeting for the election must be signed by the town clerk (*ibid.* (2)). In other cases the day of election must be fixed by the mayor (*ibid.* (6)).

**ELECTION OF MAYOR.**—The mayor is elected by the council of the

borough from among the aldermen or councillors or persons qualified (see *Mun. Corp. Act*, 1882, s. 15 (1)). The election of the mayor is to be the first business transacted at the quarterly meeting of the council on the 9th November every year, which is the ordinary day of election of the mayor (see *Mun. Corp. Act*, 1882, s. 61 (1) and (2); see also *R. v. McGowan*, 1840, 11 *Ad. & E.* 869). An outgoing alderman may vote, although the person for whom he votes is an alderman (*Mun. Corp. Act*, 1882, s. 61 (3)). In case of equality of voters the chairman, although not entitled to vote in the first instance, has the casting vote (*ibid.* s. 61 (4)); this does not, however, prevent the chairman from voting in the first instance, unless he is otherwise disqualified (see *Nell v. Longbottom*, [1894] 1 *Q. B.* 767). The mayor may receive remuneration (*ibid.* s. 15 (4)); but in such case having a pecuniary interest in the election he cannot vote for himself (see *ibid.* s. 22 (3)). Excepting the above provisions, there are no statutory directions with regard to the mode of election to the office of mayor; a show of hands is frequently adopted as the means of ascertaining the votes.

**ELECTION OF ALDERMEN.**—Aldermen are also elected by the council (*Mun. Corp. Act*, 1882, s. 14 (1)). As to the number, term of office, and rotation of aldermen, see **ALDERMEN**. The election of aldermen is on the 9th November every year; the election is to be held at the quarterly meeting of the council immediately after the election of the mayor, or if there is a sheriff, the appointment of the sheriff (*ibid.* s. 60 (1) and (2)).

Every person entitled to vote may vote for any number of persons, not exceeding the number of vacancies, by signing and personally delivering at the meeting to the chairman a voting paper containing the names and places of abode and descriptions of the persons for whom he votes (*ibid.* s. 60 (4)). But an outgoing alderman, although mayor-elect, may not vote (*ibid.* s. 60 (3); see also *Hounsell v. Suttill*, 1887, 19 *Q. B. D.* 498). In case of equality of votes, however, the chairman, although as an outgoing alderman or otherwise not entitled to vote in the first instance, has a casting vote (*Mun. Corp. Act*, 1882, s. 60 (6)). The chairman as soon as all the voting papers have been delivered to him must openly produce and read them or cause them to be read. The persons, not exceeding the number of vacancies, who have the greatest number of votes must be declared by the chairman to be, and thereupon are, elected. The voting papers having been read are delivered to the town clerk to be kept for twelve months (see *ibid.* s. 60 (5) and (7)).

**ELECTION OF COUNCILLORS.**—With regard to the election of councillors it is provided that there is to be one election of councillors for the whole borough, and where a borough has wards there is to be a separate election of councillors for each ward (see the *Mun. Corp. Act*, 1882, s. 50 (1) and (2)). As to the division of a borough into wards, see *ibid.* s. 30; see also **MUNICIPAL CORPORATION**.

The councillors are elected by the burgesses of the borough who are enrolled on the burgess roll (*Mun. Corp. Act*, 1882, s. 11; see also **BURGESS**; **MUNICIPAL CORPORATION**; **MUNICIPAL COUNCIL**).

The ordinary day of election of councillors is the 1st of November every year (*Mun. Corp. Act*, 1882, s. 52).

**The Returning Officer.**—At an election of councillors for a whole borough the Returning Officer is the mayor, and at an election for a ward the Returning Officer is an alderman assigned for that purpose by the council at the meeting of the 9th of November (*Mun. Corp. Act*, 1882, s. 53).



Where the mayor is dead, or absent, or otherwise incapable of acting in the execution of his powers and duties as to municipal elections, the council must forthwith choose an alderman to execute those powers and duties in the place of the mayor (*ibid.* s. 67 (1)). And in case of the illness, absence, or incapacity to act of the alderman assigned to be returning officer at a ward election, the mayor may appoint to act in his stead another alderman, or if the number of aldermen does not exceed the number of wards, a councillor, not being a councillor for that ward, and not being enrolled in the ward roll for that ward (*ibid.* (2)).

*Notice of Election.*—In the case of the election of a councillor the town clerk must, at least nine days before the day of election, prepare and sign a notice thereof, and publish it by fixing it on the Town Hall, and in the case of a ward election in some conspicuous place in the ward (*ibid.* s. 54). For form of notice of election, see *ibid.* Sched. VIII. Part II.

The notice of election may in the case of ward elections and of elections of auditors comprise matter necessary for several wards (see *ibid.* s. 65).

A municipal election must not be held in any church, chapel, or other place of worship (*ibid.* s. 69).

*Nomination of Candidates.*—At an election of councillors any person is entitled to subscribe a nomination paper if he is enrolled in the burgess roll, or, in the case of a ward election, the ward roll, but not otherwise. No one may subscribe a nomination paper for more than one ward (see Mun. Corp. Act, 1882, s. 51 (1) and (2)).

The nomination of candidates for the office of councillor must be conducted in accordance with the rules contained in Sched. III. Part II. of the Municipal Corporations Act, 1882. Every candidate for the office of councillor must be nominated in writing (*ibid.* r. 1). The writing must be subscribed by two burgesses of the borough, or, in the case of a ward election, of the ward, as proposer and seconder, and by eight other burgesses of the borough or ward as assenting to the nomination (*ibid.* r. 2; see also *Gothard v. Clarke*, 1880, 5 C. P. D. 253; *Moorehouse v. Linney*, 1885, 15 Q. B. D. 273; *Bowden v. Besley*, 1888, 21 Q. B. D. 309). Each candidate must be nominated by a separate nomination paper, but the same burgesses or any of them may subscribe as many nomination papers as there are vacancies to be filled, but no more (see r. 3; see also *Northcote v. Pulsford*, 1875, L. R. 10 C. P. 484; *Burgoyne v. Collins*, 1882, 8 Q. B. D. 450).

The surname and other names of the candidate, and his abode and description, must be stated on the nomination paper (see r. 5; see also *Mather v. Brown*, 1876, 1 C. P. D. 596; *Henry v. Armitage*, 1883, 12 Q. B. D. 257). For form of nomination paper, see Mun. Corp. Act, 1882, Sched. VIII. Part II.; see also *Marton v. Gorrill*, 1889, 23 Q. B. D. 139. The nomination papers must be provided by the town clerk, who must supply any burgess with as many nomination papers as may be required (*ibid.* Sched. III. r. 6).

Every nomination paper so subscribed must be delivered by the candidate, or his proposer or seconder, at the town clerk's office seven days at least before the day of election, and before 5 p.m. of the last day for delivery of nomination papers (*ibid.* r. 7).

Notice of every nomination must be sent to each candidate by the town clerk (*ibid.* r. 8).

The validity of every objection made in writing to a nomination paper, by any candidate or his representative, is to be decided by the mayor; his decision is to be given in writing, and if disallowing an objection is final,

but if allowing an objection is subject to reversal on petition questioning the election or return (see *ibid.* rr. 9, 13, and 14; see also *Howes v. Turner*, 1876, 1 C. P. D. 671; *Monks v. Jackson*, 1876, *ibid.* 683; *Pritchard v. Mayor, etc., of Bangor*, 1888, 13 App. Cas. 241; and the article ELECTION PETITION). The nomination of a person absent from the United Kingdom is void unless his written consent, given within one month before the day of his nomination in the presence of two witnesses, is produced at the time of his nomination (Mun. Corp. Act, 1882, Sched. III. r. 16).

The town clerk must, at least four days before the day of election, cause the names of all persons validly nominated, with their respective abodes and descriptions, and the names of the persons subscribing their nomination papers as proposers and seconders, to be printed and fixed on the Town Hall, and in the case of a ward election in some conspicuous place in the ward (*ibid.* r. 15).

As to offences in relation to nomination papers at municipal elections, it is provided that if any person forges, or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the town clerk any forged nomination paper knowing it to be forged, he shall be guilty of a misdemeanour, and liable to imprisonment for any term not exceeding six months, with or without hard labour, and an attempt to commit any such offence is punishable in the same way (Mun. Corp. Act, 1882, s. 74).

*Withdrawal of Candidate.*—When the number of valid nominations of candidates for the office of councillor exceeds that of the vacancies, a candidate may withdraw from his candidature by notice signed by him and delivered at the town clerk's office not later than 2 p.m. of the day next after the last day for delivery of nomination papers (*ibid.* r. 17). Such notices of withdrawal are to take effect in the order in which they are delivered; but no such notice, however, is to have effect so as to reduce the number of candidates ultimately standing nominated below the number of vacancies (*ibid.*).

Any person who corruptly induces or procures any other person to withdraw from being a candidate at a municipal election in consideration of any payment or promise of payment is guilty of illegal payment; so also is the person withdrawing in pursuance of such inducement or procurement (see the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 & 48 Vict. c. 70, s. 11). \*As to the consequences of an illegal payment, see ILLEGAL PRACTICES.

*Unopposed Election.*—Where the number of valid nominations of candidates for the office of councillor is the same as that of the vacancies the persons nominated are deemed to be elected (Mun. Corp. Act, 1882, s. 56 (2)). If the number of valid nominations is less than that of the vacancies the persons nominated are deemed to be elected, and such of the retiring councillors for the borough or ward as were highest on the poll at their election, or if the poll was equal, or there was no poll, as are selected for that purpose by the mayor, are deemed to be re-elected to make up the required number (*ibid.* s. 56 (3)). And in the event of there being no valid nomination, the retiring councillors are deemed to be re-elected (*ibid.* s. 56 (4)).

When an election of councillors is not contested, the Returning Officer must publish a list of the persons elected not later than 11 a.m. on the day of election (*ibid.* s. 57).

*Contested Election.*—In the event of the number of valid nominations exceeding the number of the vacancies to be filled, the councillors must be elected from among the persons nominated (*ibid.* s. 56 (1)). In such a case a poll must be taken by ballot.

*Polling Districts.*—The council may divide the borough or any ward into polling districts, and thereupon the overseers are, so far as practicable, to make out the parish burgess lists so as to divide the names in conformity with the polling districts (Mun. Corp. Act, 1882, s. 64).

*Polling Stations, etc.*—It is the duty of the mayor to provide everything, including polling stations, ballot boxes, ballot papers, etc., which in the case of a parliamentary election is required to be provided by the Returning Officer for the purpose of the poll, and he must appoint officers for taking the poll and counting the votes (*ibid.* Sched. III. Part III. 3). The mayor must furnish every polling station with such number of compartments in which voters can mark their votes screened from observation, and furnish each presiding officer with such number of ballot papers as may be necessary for effectually taking the poll at the election (*ibid.* 4). The provisions of the Ballot Act, 1872, with respect to the use of a room for taking a poll do not apply to municipal elections (*ibid.* 1).

The mayor must, at least four days before the day of election, give public notice of the situation, division, and allotment of polling places for taking the poll at the election, and of the description of the persons entitled to vote thereat, and at the several polling stations (*ibid.* 2).

It should be observed that in the application to municipal elections of the rules contained in Sched. I. Part I. of the Ballot Act, 1872, the following modification must be made, viz. the expression "register of voters" means the burgess roll of the burgesses of the borough, or in the case of an election for the ward of a borough, the ward list; and the mayor must provide true copies of such register for each polling station (see the Ballot Act, 1872, Sched. I. Part II. r. 64 (a)); and the provisions with respect to the day of the poll do not apply to municipal elections (*ibid.* r. 64 (c)).

*Agents at Municipal Elections.*—Nothing in the Ballot Act, 1872, as applied by the Municipal Corporations Act, 1882, is to be deemed to authorise the appointment of any agents of a candidate at a municipal election; but if in the case of a municipal election an agent of a candidate is appointed, and notice in writing of the appointment is given to the Returning Officer one clear day before the polling day, then the provisions of the Ballot Act, 1872, with respect to agents of candidates are, as far as regards that agent, to apply in the case of that election (Mun. Corp. Act, 1882, s. 58 (6)).

*The Poll.*—If an election of councillors is contested, the poll is as far as circumstances admit to be conducted as the poll at a contested parliamentary election is by the Ballot Act, 1872, directed to be conducted (Mun. Corp. Act, 1882, s. 58 (1)). The provisions of the Ballot Act, 1872, relating to a poll at a parliamentary election, including the provisions relating to the duties of the Returning Officer after the close of the poll, apply to a poll at an election of councillors, subject, however, to the provisions and modifications introduced by the Municipal Corporations Act, 1882 (see s. 58 (1), and Sched. III. Part III. of that Act; see also Sched. I. Part II. of the Ballot Act, 1872). The Ballot Act, 1872, however, being an annual Act, provision is also made by the Municipal Corporations Act, 1882, as to the enactments which are to revive in the event of its ceasing to be in force (see Mun. Corp. Act, 1882, s. 76, and Sched. III. Part IV.).

As to the provisions of the Ballot Act, 1872, relating to the poll and the proceedings at the close of the poll, reference should be made to the article **BALLOT**, and to the first part of this article (**I. Parliamentary Elections**); see also the article **RETURNING OFFICER**.

It is necessary here merely to indicate the points of difference in the

rules regulating the poll at municipal as compared with parliamentary elections.

The enactments in force as to the appointment by the candidates of agents to attend at the poll for the detection of personation, and for the apprehension of persons charged with personation at a parliamentary election, apply also to municipal elections (see *Mun. Corp. Act, 1882, s. 86*; see also as to the effect of such enactments, the first part of this article (*I. Parliamentary Elections*), and the articles *BALLOT* and *CORRUPT PRACTICES*).

The hours of polling are the same at municipal as at parliamentary elections (see the *Elections (Hours of Poll), Act, 1885, 48 Vict. c. 10*); the poll therefore commences at 8 a.m., and must close at 8 p.m.

But if one hour elapses during which no vote is tendered, and the Returning Officer has not received notice that any person has within that hour been prevented from coming to the poll by any riot, violence, or other unlawful means, the Returning Officer may, if he thinks fit, close the poll at any time before the statutory hour for closing the poll has arrived (see *Mun. Corp. Act, s. 58 (4)*, and the *Elections (Hours of Poll) Act, 1885, s. 1*).

At an election of councillors a person is entitled to demand and receive a voting paper, and to vote, if he is enrolled in the burgess roll, or in the case of a ward election, the ward roll, but not otherwise, and no one may vote in more than one ward (see *Mun. Corp. Act, 1882, s. 51 (1) and (2)*). Every person entitled to vote may vote for any number of candidates not exceeding the number of vacancies (*ibid. s. 58 (2)*).

The facilities for voting given to police constables at parliamentary elections by the *Police Disabilities Removal Act, 1887*, are extended to municipal and other elections by the *Police Disabilities Removal Act, 1893, 56 Vict. c. 6, s. 2*.

*Questioning Voters at the Poll.*—At an election of councillors the presiding officer must, if required by two burgesses, or by a candidate or his agent, put to any person offering to vote, at the time of his presenting himself to vote, but not afterwards, the following questions or either of them:—(1) Are you the person enrolled in the burgess [or ward] roll now in force for this borough [or ward] as follows [*read the whole entry from the roll*]? (2) Have you already voted at the present election [*and in case of an election for several wards, in this or any other ward*]? The vote of a person required to answer either of these questions is not to be received until he has answered it. Making a false answer to such question is a misdemeanour. Excepting these two questions, no inquiry is permitted at an election as to the right of any person to vote (*Mun. Corp. Act, 1882, s. 59*).

*Counting the Votes.*—It is the duty of the mayor at municipal elections to appoint officers for counting the votes (see *Mun. Corp. Act, 1882, Sched. III. Part III. 3*).

The procedure at the counting of the votes is the same as at parliamentary elections, being in accordance with the provisions of the *Ballot Act, 1872*; for details of which, see the first part of this article, and the article *BALLOT*.

*Casting Vote.*—But the provisions of the *Ballot Act, 1872, s. 2*, with respect to the voting of a Returning Officer (see *ante, p. 457*) do not apply in the case of a municipal election. Where, at such an election, an equality of votes is found to exist between any candidates, and the addition of a vote would entitle any of those candidates to be declared elected, the Returning Officer, whether entitled or not to vote in the first instance, may

give such additional vote by word of mouth or in writing (see *Mun. Corp. Act, 1882, s. 58 (5), and Sched. III. Part III. 1*).

*Double Election of Councillor.*—Provision is made for the event of a person being elected councillor in more than one ward. In such case he must, within three days after notice of his election, choose by writing signed by him, and delivered to the town clerk, or in default of his doing so the mayor must, within three days after the time for his choice has expired, declare for which of these wards he is to serve, and the choice or declaration is conclusive (*ibid. s. 68*).

No return with regard to municipal elections is to be made to the Clerk of the Crown in Chancery as in the case of parliamentary elections (*Mun. Corp. Act, 1882, Sched. III. Part III. 6*).

*Custody of Ballot Papers, etc., after the Poll.*—All ballot papers and other documents which in the case of a parliamentary election are forwarded to the Clerk of the Crown in Chancery, must in the case of municipal elections be delivered to the town clerk of the municipal borough in which the election is held, and must be kept by him among the records of the borough, and the provisions of the Ballot Act, 1872, Sched. I. Part I., with respect to the inspection, production, and destruction of such ballot papers and documents, and to the copies of such documents, are, with certain modifications, to apply respectively to the ballot papers and documents so in the custody of the town clerk (see the Ballot Act, 1872, Sched. I. Part II. (b)).

*Expenses of Municipal Election.*—The expenses incurred by the town clerk and other municipal authorities in relation to the holding of municipal elections are to be defrayed out of the borough fund (see *Mun. Corp. Act, 1882, s. 140 (1), Sched. III. Part III. 5, and Sched. V. Part II.*). The payment of such expenses out of the borough fund cannot be made without an order of the council, signed by three members of the council, and countersigned by the town clerk (see *ibid. ss. 140 (2) and 141 (1), and Sched. V. Part II.*). Any such order may be removed into the Queen's Bench Division of the High Court by writ of *certiorari*, and may be wholly or partly disallowed or confirmed on motion and hearing, with or without costs, according to the judgment and discretion of the Court (*ibid. s. 141 (2)*).

**ELECTION OF ELECTIVE AUDITORS.**—The accounts of municipal councils are audited by three borough auditors, one of whom, called the Mayor's Auditor, is appointed by the mayor, the other two are elected by the burgesses, and called Elective Auditors. The term of office of each auditor is one year (*Mun. Corp. Act, 1882, s. 25 (1) and (4)*).

The ordinary day of election of the Elective Auditors is the 1st of March, or such other day as the council, with the approval of the Local Government Board, may from time to time appoint (*ibid. s. 62 (1)*).

Elections of Elective Auditors must be held at the Town Hall, or some other convenient place appointed by the mayor (*ibid. s. 62 (5)*). An elector may not vote for more than one person to be Elective Auditor (*ibid. s. 62 (4)*).

In all other respects the provisions with regard to the nomination and election of councillors for a borough not having wards apply to the nomination and election of Elective Auditors (*ibid. s. 62 (6)*).

**ACCEPTANCE OF CORPORATE OFFICE.**—Every qualified person elected to a corporate office, unless legally exempted, must either accept the office by making and subscribing the declaration required by the Municipal Corporations Act, 1882, within five days after notice of election, or in lieu thereof

is liable to pay to the council a fine of such amount not exceeding, in case of an alderman, councillor, or elective auditor, £50, and in case of a mayor, £100, as the council by by-law determine. If no such by-law is made, the fine, in the case of an alderman, councillor, or elective auditor, is to be £25, and in the case of a mayor, £50. Such fine is recoverable summarily (see *Mun. Corp. Act, 1882, s. 34 (1) (2) and (4)*; as to the persons exempted, see *ibid. s. 34 (3)*).

For form of declaration on acceptance of corporate office, see *ibid. Sched. VIII. Part I.* This declaration must be made and subscribed before two members of the council, or the town clerk, before the person elected to a corporate office can act in such office (*ibid. s. 35*).

**RESIGNATION OF CORPORATE OFFICE.**—Any person elected to a corporate office may, however, at any time resign the office by writing signed by him, and delivered to the town clerk, on payment of the fine provided for non-acceptance of the office, in which case the council must forthwith declare the office vacant, and give notice to that effect in writing, signed by three members of the council, and countersigned by the town clerk, and fixed on the Town Hall, and the office thereupon becomes vacant (see *ibid. s. 36 (1) and (2)*).

**PENALTY FOR ACTING IN OFFICE IF UNQUALIFIED.**—Any person acting in a corporate office without having made the required declaration, or without being qualified at the time of making it, or after ceasing to be qualified, or after becoming disqualified, is liable for each offence to a fine not exceeding £50, recoverable by action (*ibid. s. 41 (1)*; see also *De Souza v. Cobden*, [1891] 1 Q. B. 687).

**MANDAMUS TO COMPEL ELECTION.**—If a municipal election is not held on the appointed day, or within the appointed time, it may be held on the day next after that day, or the expiration of that time (*Mun. Corp. Act, 1882, s. 70 (1)*); and in the event of the election not then being held the municipal corporation is not to be thereby dissolved or disabled from electing; but the High Court may, on motion, grant a mandamus for the election to be held on a day appointed by the Court. Thereupon public notice of the election must be fixed on the Town Hall by such person as the Court directs, and kept so fixed for at least six days before the day appointed for the election; and in all other respects the election is to be conducted as an ordinary election (see *ibid. s. 70 (2) and (3)*; see also *R. v. Pembroke*, 1840, 8 Dow. Pr. Cas. 302; *R. v. Mayor of Stratford-on-Avon*, 1886, 2 T. L. R. 431).

**PROCEEDINGS TO TEST VALIDITY OF ELECTION.**—As to the grounds on which a municipal election may be questioned, and as to the procedure with regard to municipal election petitions, see the article **ELECTION PETITION**; see also **CORRUPT PRACTICES**; **ILLEGAL PRACTICES**; **RECOUNT**; **SCRUTINY**.

An election will not be invalidated merely by non-compliance with the rules, or mistake in the use of the forms, contained in the Schedules to the Municipal Corporations Act, 1882, if it appears to the Court having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of the Act (*ibid. s. 72*; see also *s. 240*, and *Marton v. Gorrill*, 1889, 23 Q. B. D. 139).

Where, however, it is intended to question the validity of a municipal election, there should be no delay in commencing proceedings, for it is expressly enacted that every municipal election not called in question within

twelve months after the election, either by election petition or by information in the nature of a *quo warranto*, is to be deemed to have been to all intents a good and valid election (Mun. Corp. Act, 1882, s. 73; on the construction of this section, see *De Souza v. Cobden*, [1891] 1 Q. B. at p. 689).

#### MUNICIPAL ELECTIONS IN THE CITY OF LONDON.

The regulations with regard to the conduct of municipal elections in the City of London depend upon certain ancient customs, charters, and statutes. For detailed information as to these, reference should be made to the *Liber Albus* compiled in 1419, translation by Riley, 1861, Part I., chaps. v., xii., xvi., etc.; Norton, *Commentaries on the History, Constitution, and Chartered Franchises of City of London*, 3rd ed., 1869; Firth, *Municipal London*, 1876, and other authorities.

The Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 & 48 Vict. c. 70, and Part IV. of the Municipal Corporations Act, 1882, are, subject to the necessary modifications, expressly applied to municipal elections in the City of London, *i.e.* elections to the office of mayor, alderman, common councilman, or sheriff, including the election of any officer elected by the mayor, aldermen, and liverymen in common hall (see Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 35). The provisions of the two last-mentioned statutes relating to personation, polling agents, and disclosure of votes, are also expressly applied to municipal elections within the City of London by the City of London Ballot Act, 1887, 50 Vict. c. xiii. s. 9.

The system of voting by ballot was introduced at municipal elections in the City of London by the City of London Ballot Act, 1887, which provides (see s. 2) that in the case of a poll being demanded at such elections by any of the candidates, or by any two or more of the electors, the poll must be taken by ballot, and the presiding officer at such elections is to be the Returning Officer, with the powers and duties conferred and imposed on a returning officer by the Ballot Act, 1872. The taking of the votes at such poll is, as far as circumstances admit, to be conducted in the same manner as the taking of the votes at a contested parliamentary election is by the Ballot Act, 1872, directed to be conducted, and the other provisions of that Act relating to a poll at a parliamentary election, including the provisions relating to the duties of the Returning Officer after the close of poll, are, as far as circumstances admit, but subject to certain modifications, to apply to a poll at any municipal election within the City of London (see the City of London Ballot Act, 1887, s. 3; as to the modifications of the Ballot Act, 1872, in its application to such elections, see the Schedule to the City of London Ballot Act, 1887).

#### SCHOOL BOARD ELECTIONS.

The election of a School Board is regulated by the rules made from time to time by the Education Department under the power conferred by the Elementary Education Act, 1873, 36 & 37 Vict. c. 86, it being provided by that Act (see ss. 6, 26, and Sched. II.) that the election of a School Board is to be held at such time, in such manner, and in accordance with such regulations as the Education Department may from time to time by order prescribe. The Education Department may also by order appoint or direct the appointment, and make regulations as to the duties, remuneration, and expenses of, any officers requisite for the purpose of such election, and do and make regulations respecting all other necessary things pro-

liminary or incidental to such election, and revoke or alter any previous order (*ibid.* Sched. II.).

At every School Board election the candidates must be nominated in writing, and any poll is, so far as circumstances admit, to be conducted in the same way as the poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted (see Elementary Education Act, 1873, Sched. II. (a) and (b)). Subject to any exceptions or modifications contained in any Order of the Education Department made in pursuance of the Elementary Education Act, 1873, the Ballot Act, 1872, is to apply in the case of the election of a School Board (*ibid.* Sched. II. (b)).

For detailed information as to School Board elections reference must be made to the rules contained in the various Election Orders published from time to time under the Act (see, for example, the Order regulating the Triennial Election of the School Board for London, 1894). One peculiarity of the voting at School Board elections may, however, here be noticed; the voting at such elections is cumulative (see the article *BALLOT* see also, as to marking the ballot papers at such elections, *Morris and Others v. Beves and Others*, [1897] 1 Q. B. 449).

• See further as to School Board elections, Rogers on *Elections*, 17th ed., vol. iii. pp. 77-81, 150-155, 185-187; see also *SCHOOL BOARD*.

#### COUNTY COUNCIL ELECTIONS.

County Council elections, *i.e.* the elections of County Aldermen, County Councillors, and Chairmen of County Councils, are regulated by the provisions of the Local Government Act, 1888, 51 & 52 Vict. c. 41, as amended by the County Councils (Elections) Act, 1891, 54 & 55 Vict. c. 68, under which the procedure at such elections is as nearly as possible assimilated to that at municipal elections, and, in particular, the provisions of the Ballot Act, 1872, are made applicable as far as circumstances admit.

By the Local Government Act, 1888, a council is established in every administrative county as defined by that Act, and is intrusted with the management of the administrative and financial business of the county, and consists of the chairman, aldermen, and councillors (s. 1).

The council of a county and the members thereof are constituted and elected and conduct their proceedings in like manner, and are in the like position in all respects, as the council of a borough divided into wards, subject nevertheless to the provisions of the Act (*ibid.* s. 2).

The aldermen are called county aldermen, and the councillors, county councillors (*ibid.* s. 2 (1) and (2)). As to their qualifications for election, see *COUNTY COUNCIL*.

The county councillors are elected for a term of three years, and then retire together, and their places must be filled by a new election. The divisions of the county for the purpose of the election of county councillors are called electoral divisions and not wards, and one county councillor only is to be elected for each electoral division (*ibid.* s. 2 (2)).

The ordinary day of election of county councillors in each county is to be such day between the 1st and 8th of March as the County Council may fix, and, if no date is so fixed, it is to be the 8th of March (see the County Councils (Elections) Act, 1891, s. 1 (1)); the ordinary day of election of the chairman and of the aldermen is to be the 16th of March, or such other day within ten days after the 8th of March in every third year as the County Council of any county may from time to time fix (*ibid.* s. (1) (3)).

• For the purpose of the provisions of the Local Government Act, 1888,



with respect to County Councils, and to the chairmen, members, committees, and officers of such councils, and otherwise for the purpose of carrying that Act into effect, the provisions of the Municipal Corporations Act, 1882 (as amended by the Municipal Elections (Corrupt Practices) Act, 1884), relating to municipal elections, are, so far as the same are unrepealed, and are consistent with the provisions of that Act, to apply as if they were therein re-enacted with the enactments amending the same in such terms and with such modifications as are necessary to make them applicable to the said councils and their chairmen, members, committees, and officers, and to the other provisions of that Act (Local Government Act, 1888, s. 75).

Certain regulations are, however, expressly made with regard to County Council elections which it is impossible here to set forth in detail. As to these, see *ibid.* sec. 75 (1)–(21); see also the County Councils (Elections) Act, 1891, the article COUNTY COUNCIL, and the authorities mentioned at the end of this article.

#### PARISH COUNCIL AND DISTRICT COUNCIL ELECTIONS, ETC.

The election of the members and chairmen of Parish Councils, Rural District Councils, Urban District Councils, and Boards of Guardians, and the election of Metropolitan Vestrymen and Auditors, are regulated by the provisions of the Local Government Act, 1894, 56 & 57 Vict. c. 73, and the rules contained in the various Election Orders made from time to time by the Local Government Board in pursuance of the powers conferred by that Act. As to the constitution of these bodies, see the articles DISTRICT COUNCILS; PARISH COUNCILS; GUARDIANS, etc.

The rules in relation to elections framed under the Local Government Act, 1894, by the Local Government Board, are to have effect as if enacted in that Act (*ibid.* s. 48 (1)).

Such rules must provide among other things—

- (i.) for every candidate being nominated in writing by two parochial electors, as proposer and seconder, and no more;
- (ii.) for preventing an elector at a union, or for a district not a borough, from subscribing a nomination paper or voting in more than one parish or other area in the union or district;
- (iii.) for preventing an elector at an election for a parish divided into parish wards from subscribing a nomination paper or voting for more than one ward;
- (iv.) for fixing or enabling the County Council to fix the day of the poll, and the hours during which the poll is to be kept open, so, however, that the poll shall always be open between the hours of six or eight in the evening;
- (v.) for the polls at elections held at the same date and in the same area being taken together, except where this is impracticable;
- (vi.) for the appointment of returning officers for the elections (see *ibid.* s. 48 (2)).

The system of voting by ballot is applied by the Local Government Act, 1894, to all elections under the Act, sec. 48 (3) enacting that at every election regulated by rules framed under the Act, the poll is to be taken by ballot, and the Ballot Act, 1872, and the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and secs. 74 and 75 and Part IV. of the Municipal Corporations Act, 1882, as amended by the last-mentioned Act (including the penal provisions of those Acts), are, subject to adaptations, alterations, and exceptions made by such rules, to apply in like manner as in the case of a municipal election. Provided that sec. 5 of the Ballot Act, 1872, is to apply in

the case of such elections, and the Returning Officer may, in addition to using the schools and public rooms therein referred to free of charge, for taking the poll, use the same, free of charge, for hearing objections to nomination papers and for counting votes; and sec. 37 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, is to apply as if the election were an election mentioned in Sched. I. of that Act.

For further information with regard to the various elections under the Local Government Act, 1894, reference must be made to the Act, to the various Election Orders published from time to time under the Act, and to the authorities mentioned below. The Local Government (Elections) Act, 1896, 59 Vict. c. 1 (continued by the Expiring Laws Continuance Act, 1897, 60 & 61 Vict. c. 54), and the Local Government Act, 1897, 60 Vict. c. 1, should also be noted.

• See also ALDERMEN; BALLOT; CORRUPT PRACTICES; COUNTY COUNCIL; DISTRICT COUNCIL; ELECTION EXPENSES; ELECTION PETITION; ILLEGAL PRACTICES; LOCAL GOVERNMENT; METROPOLITAN VESTAGES; MUNICIPAL CORPORATION; MUNICIPAL COUNCIL; PARISH COUNCILS; GUARDIANS; RETURNING OFFICER; SCHOOL BOARDS, etc.

• [*Authorities.*—Bazalgette and Humphreys, *Law relating to Local and Municipal Government*, 1888; Macmorran, *Local Government Act*, 1888; Bazalgette and Humphreys, *Law relating to County Councils*, 3rd ed., 1889; Glen, *Law relating to County Government*, 1890; Lushington, *County Council and Municipal Elections Manual*, 1892; Rogers on *Elections*, 17th ed., vol. iii. (Municipal and other Elections), 1894; Ryde, *Election Manual for Parish Councillors, Urban and Rural District Councillors and Guardians outside London*, 1894; Macmorran and Dill, *The Local Government Act*, 1894, 1896; Hunt, *London Local Government*, 1897.]

**Electoral Franchise.**—See ELECTIONS; FRANCHISE (ELECTORAL).

**Electricity.**—A person who, without statutory authority, creates on his own land an electric current for his own purposes and discharges it into the earth beyond his control, is responsible for damage caused by the current to the same extent as if he had so discharged a stream of water brought by him on his land (see *National Telephone Co. v. Baker*, [1893] 2 Ch. 186). See also NUISANCE.

• **Electric Lighting.**—The statutory law as to electric lighting is contained in the Electric Lighting Acts, 1882 (45 & 46 Vict. c. 56) and 1888 (51 & 52 Vict. c. 12). The following is a brief summary of the conjoint effect of their provisions. Authority to supply electricity for “public” or “private” purposes (the former term means streets, churches, halls, theatres, etc., Act of 1882, s. 3 (3); the latter other purposes, except the transmission of telegrams, *ibid.* (4)) may be conferred on local authorities, companies, or persons (the undertakers, s. 2), either by *licence* (s. 3), or by *provisional order* of the Board of Trade (s. 4), or by *special Act*.

**Authority by Licence.**—The consent of every local authority having jurisdiction within the area to be supplied must be obtained to the application

(s. 3 (1)), which, in the case of a local authority being applicants, is to be based on a preliminary resolution (s. 1 (6)), and of which, in every case, public notice is to be given (s. 3 (5)). The duration of the licence is not to exceed seven years, but renewals may be granted (s. 3 (2)). The licence may contain regulations as to the limits and conditions of supply, revocation, etc. (s. 3 (8)), or the grant of concurrent powers to local authority if not the undertakers (s. 3 (9)).

*Authority by Provisional Order.*—The consent of the local authority of the district to be supplied is necessary unless the Board of Trade dispense with it, in which case a special report must be made stating the grounds of such dispensation (Act of 1888, s. 1, amending s. 4 of Act of 1882). Notice of application for provisional order is to be given to the local authority on or before 1st July in the year of such application (Act of 1882, s. 4 (1)). No provisional order is to be of any force till confirmed by Act of Parliament (s. 4 (2), and see note on this clause in Chitty, *Statutes*, s.v. "Electric Lighting," p. 3, n. (p)), which may be opposed as in the case of PRIVATE BILLS (s. 4 (3)). Any Act confirming a provisional order may, on the application of the undertakers, be repealed, altered, or amended by a subsequent provisional order, confirmed by Parliament (*ibid.* (4)).

*Authority by Special Act.*—No provisional order can take effect without confirmation by Parliament. But a special Act may be obtained without a preliminary provisional order.

*Provisions applicable alike to Licences and Provisional Orders.*—The Board of Trade may make rules as to applications, payments, etc., to be laid before Parliament within three weeks—(a) after they are made if Parliament is sitting; (b) after the beginning of the next session if it is not (s. 5). These rules are to be judicially noticed (*ibid.*). See COGNISANCE, JUDICIAL. The undertakers are to be subject to such regulations as may be imposed with regard to limits of area, regular supply (and see s. 19), safety, limit of charges (and see s. 20), inspection, enforcement of supply, etc., and this provision applies in so far as *safety* is concerned, not only to regulations originally inserted in licences, etc., but to rules made from time to time by the Board of Trade or any local authority within whose district electricity is authorised to be supplied (s. 6). The Board of Trade has also power to secure the protection of the public from open electric lines or works (not laid down or erected by any person or body for the supply of electricity from one part of his or their premises to another) by prescribing the conditions of the continuance and use of such lines and works (Act of 1888, s. 4 (2)), and in case of non-compliance may require their removal (s. 4 (1)). A penalty not exceeding £20 may also be recovered summarily for such non-compliance in any Court of summary jurisdiction (*ibid.* (3)). These provisions do not exclude the powers of local authorities in respect of nuisances or apprehended danger from above-ground wires, etc. (cp. *Wandsworth Board of Works v. United Telephone Co.*, 1884, 13 Q. B. D. 904). The expenses of local authorities incurred under the Act, etc., may be defrayed out of the local rates (Act of 1882, s. 7); as to the definition of which, see *ibid.* s. 31 and schedule. Where a local authority is a rural sanitary authority, such expenses are to be deemed "special expenses" within the meaning of the Public Health Act, 1875, s. 229 (*ibid.* s. 7). The borrowing powers of local authorities in this connection are dealt with in the schedule to the Act of 1882; where the Local Loans Act, 1875, applies to any district, the moneys may be borrowed in the manner prescribed by that statute (s. 8). The undertakers' accounts are to be made on or before 25th March in each

year to 31st of preceding December, in such form, etc., as the Board of Trade prescribes (s. 9). Undertakers have power to do all acts and things necessary and incidental to the supply of electricity (ss. 10 and 11), but cannot divest themselves of their powers or liabilities by contract or assignment without the consent of the Board of Trade (s. 11). The following Acts are incorporated:—(a) Lands Clauses Acts, except as regards compulsory taking and entry upon land by promoters; (b) Gas Works Clauses Act, 1847, as to breaking up streets for laying pipes and waste or misuse of gas, etc. (but undertakers are not to prescribe special form of lamp or burner, Act of 1882, s. 18); (c) Gas Works Clauses Act, 1871, ss. 38–42 inclusive, and 45 & 46 (s. 12). Restrictions are imposed on breaking up private streets, railways, and tramways (s. 13); as to above-ground works (s. 15; and see ss. 13 and 15 of Public Health Acts Amendment Act, 1890, which is adoptive only). But the position of pipes and wires may be altered (s. 15). There are clauses for the protection of canals (s. 16), mines (s. 33), the privileges of the Postmaster-General (s. 35; and see Act of 1888, s. 4 (2)), compensation for damage (s. 17) to be determined by arbitration, conducted under the Board of Trade Arbitrations, etc., Act, 1874 (s. 28), and for the protection of the Postmaster-General (s. 26). Recovery of charges may be enforced by cutting off supply (s. 21). Electric lines, etc., belonging to undertakers placed in or on premises not in the possession of the undertakers for the purpose of supplying electricity, are not subject to distress, etc. (s. 25). Officers appointed by the undertakers have power to enter lands or premises for ascertaining quantities of electricity consumed or to remove fittings, etc. (s. 24). The Board of Trade has power to relieve gas undertakers from the obligation to supply gas within areas sufficiently lighted by electric light (s. 29). The malicious or fraudulent abstraction, etc., of electricity is simple larceny, and punishable accordingly (s. 23). See LARCENY. Injuring electric works unlawfully and maliciously is felony, punishable with penal servitude for any term not exceeding five years, or imprisonment for any term not exceeding two years with or without hard labour. Right of proceedings under the Act of 1882 or any other Act or at common law is preserved, so that no person is punished twice for the same offence (s. 22). Provision is made for the purchase of an undertaking by the local authority within whose jurisdiction its area or any part thereof is situated within six months after the expiration of a period of forty-two years from the date of the order or Act authorising it, or within six months after the expiration of every subsequent period of ten years (assuming that no shorter period is in either case specified in the order or Act) (Act of 1888, s. 2, substituted for s. 27 of the Act of 1882). The Board of Trade may vary the terms of purchase by provisional order (Act of 1882, s. 3). The principles of computation are similar to those prescribed by the Tramways Act, 1870. See TRAMWAYS. See further the articles POST OFFICE; PROVISIONAL ORDER; TELEGRAPHS; TELEPHONES.

There are several reported decisions in regard to the law of electric lighting that deserve incidental notice here—(1) Where a street is vested in a local board under sec. 149 of the Public Health Act, 1875, what is comprised in the term “street” is not merely the surface of the road, but “the area of user” therein, i.e. the soil beneath the actual road to such a depth, and the space over the surface to such a height as is reasonably required to enable the local authority to execute its statutory powers and perform its statutory duties. Undertakers under the Electric Lighting Acts are entitled to such an “area of user” (*cp. Fareham Local Board and Fareham Electric Light Co. v. Smith*, W. N. 1891, 76). The right of a local board

under the first paragraph of sec. 16 of the Public Health Act, 1875, to provide light by other means than gas (*e.g.* electricity) is not affected by the subsequent paragraphs, which were only inserted to prevent an urban authority from invading the regulated monopoly of any gas company in its district (S. C.). See *GAS*. (2) As to the grant of injunctions or the award of damages in cases of vibration caused by electric lighting, see *Shelfer v. City of London Electric Lighting Co.*, and *Meux's Battery v. The Same* (No. 1), [1895] 1 Ch. 287, and *NUISANCE*. (3) Faculties have been granted for the use of disused churchyards for electric lighting purposes. See *In re St. Benet Sherehog*; *In re St. Nicholas Acons*, [1893] Prob. 66 n.; *In re St. Nicholas College Abbey*; *In re St. Benet Fink Churchyard*, [1893] Prob. 58.

[*Authorities*.—Michael and Will, *Gas, Water, and Electric Lighting*, 4th ed.; Bower and Webb, *Electric Lighting*, 2nd ed.]

**Elegit.**—See *EXECUTION*.

**Elementary Education.**—See *EDUCATION*.

**Elephant.**—Elephants being imported animals *feræ naturæ*, however domesticated they may be in fact, are not domestic animals within the provisions of the Acts for preventing cruelty to animals (see *Harper v. Marcks*, [1894] 2 Q. B. 319); but it would seem that they fall within the provisions of the Larceny Act, 1861, as to theft of animals ordinarily kept in a state of confinement (24 & 25 Vict. c. 96, s. 21; see *Indian Penal Code*, s. 429; Mayne, *Indian Criminal Law*, 1896, p. 191). And the fact that some elephants have been thoroughly tamed is not in law regarded as enough to exclude the elephant from the class of animals of a known mischievous or undomesticated character. Consequently the owner of an elephant keeps it at his own risk, and is liable for all injury done by it, without need of proof that it was known to be mischievous (*Fiburn v. People's Palace and Aquarium Co.*, 1890, 25 Q. B. D. 258; and see Beven, *Negligence*, 2nd ed., bk. iii. c. 5; Mayne, *Indian Criminal Law*, 1896, p. 576).

**Elsewhere.**—As to meaning of condition “insured elsewhere” in fire policy, see *Australian Agricultural Co. v. Saunders*, 1875, L. R. 10 C. P. 668; as to “the United Kingdom or elsewhere” in sec. 2, Sched. D, Income Tax Act, 1853, 16 & 17 Vict. c. 34, see *Colquhoun v. Brooks*, 1888, 21 Q. B. D. 52; 1889, 14 App. Cas. 493. See further, Stroud, *Jud. Dict.*

A will contained the following clause:—“I give and bequeath to A. B. and C. all my personal effects, and everything of every kind that I now have, or may have at the time of my decease, in my apartments at 13 Plaistow Grove, or elsewhere”; upon this it was held in *In the Goods of Scarborough*, 1860, 30 L. J. Prob. 85, that the residuary personal estate passed under the words “or elsewhere.” See also *INSURED ELSEWHERE*.

**Ely.**—As to the position of the Isle of Ely since 6 & 7 Will. IV. c. 84, see *FRANCHISE*.

**Embankment.**—Various legal questions have arisen in connection with embankments. As to the right of riparian owners to embank, see *Lyon v. Fishmongers Co.*, 1875, L. R. 10 Ch. 679; 1876, 1 App. Cas. 662 (a case turning on the Thames Conservancy Act, 20 & 21 Vict. c. cxlvii. ss. 53 and 179). As to the rateability of sewers on the Thames Embankment, see *Metropolitan Board of Works v. Overseers of West Ham*, 1870, L. R. 6 Q. B. 193. As to compensation for embankments, see *Lord Blantyre v. Babbie*, 1888, 13 App. Cas. 631.

**Embargo**, a word of Spanish origin, is the detention by a State of vessels within its ports. It may be a measure of public utility, hostility, or defence; and sometimes, like reprisal (*q.v.*), retortion (*q.v.*), and pacific blockade (see **BLOCKADE**), is resorted to as a mode of putting stress upon a weaker State. In the past it has also served as a provisional act pending the further development of unfriendly relations with another State.

Calvo distinguishes between embargo and “l’arrêt de prince” that is, the temporary prohibition of one or more trading vessels, anchored in a port under blockade or in some other exceptional political circumstance, to quit its or their moorings (*Droit International*, Paris, 1888, s. 1826).

• It is within the powers of the British sovereign to lay an embargo on even British ships; but a proclamation to lay an embargo in time of peace, *e.g.*, upon all vessels laden with wheat in a period of public scarcity, has been deemed contrary to law, and particularly to 22 Car. II. c. 13. The advisers of such a proclamation, and all persons acting under it, took care to be indemnified by a special Act of Parliament (7 Geo. III. 7; *Black. Com.* ii. See Phillimore, *Intern. Law*, vol. iii. ch. iii.).

Embargoes seem to be an attenuated survival of the more rigorous practice of the Middle Ages of considering war as a complete rupture between belligerent States, as a suspension of all respect for the person and property of the private citizen, and an opening up of a general right of capture and confiscation as between them. A more humane practice appears to have sprung up as early as the twelfth century, if we may judge by the following article of Magna Carta (1215):—“And if there shall be found any such (merchants) in our land in the beginning of a war, they shall be attached, without damage to their bodies or goods, until it may be known unto us, or our Chief Justiciary, how our merchants are treated who happen to be in the country which is at war with us; and if ours be safe there, theirs shall be safe in our lands” (Art. 48).

In our own times embargoes in anticipation of war have fallen into disuse.

During the war between France and Sardinia against Austria, all vessels then in port belonging to France and Sardinia were by a decree of the Austrian Government (May 17, 1859) permitted to unload and leave the Austrian ports unmolested.

In the Franco-German war of 1870, the commanding officers of the French fleets and men-of-war received orders (July 25, 1870) to grant a respite of thirty days to the enemy’s trading vessels to leave the French ports in case they should be in a French port at the outbreak of war, or enter one thereafter in ignorance of the existence of war.

The North German Confederation, on their side, had resolved that, in the event of war with France, all French merchant vessels in German ports at the outbreak of war, or entering them in ignorance thereof after the war had begun, should be granted a similar respite, but of six weeks, and this resolution was duly proclaimed (July 17, 1870).

Professor von Bulmerincq infers from these instances, that it is now beyond doubt that the ships which are at the outbreak of war in an enemy's port are entitled to a respite to unload, reload, and clear out, so that neither ship nor cargo is any longer exposed to embargo in anticipation of war. On the other hand, the passing in and out of merchant vessels from belligerent ports may rightly be forbidden, in order to prevent the spreading of knowledge of their state of defence. Thus, immediately after the outbreak of the Franco-German war, a decree was issued from Kiel Harbour to the ships of all nations, prohibiting, from a certain date, entry into or departure from that port. This was in the interest of the defence operations and their secrecy; and, says Professor von Bulmerincq, "it has been considered well-founded." "And," he adds, "if the departure of any ships is nevertheless to be feared, the still more rigorous measure of an embargo on ship and freight, and detention of the seamen, are equally justifiable" (Holtzendorff's *Handbuch des Völkerrechts*, vol. iv. pp. 114, 115).

The most recent cases of coercive embargo are those by England against Neapolitan ships in 1838, by France against Portuguese ships in 1831, and by England and France against Dutch ships in 1839. See BLOCKADE.

Contracts are not dissolved by an embargo or temporary restraint of their performance imposed by the Government of the country in whose ports the vessel may happen to be, as a measure of political caution in time of war, or upon the expectation of it, either in the lading port or in a place at which the ship may have touched in the course of her voyage (Abbott's *Law of Merchant Ships and Seamen*, 12th ed., p. 439). This received judicial consecration in *Hadley v. Clarke* (1799, 8 T. R.; 4 R. R. 641, 259), in which the Court was of opinion that the embargo being only a temporary restraint, the plaintiff had a right to recover.

It has, however, been held that arrest, detention, or embargo of the ship, whether by a hostile or friendly Government, gives a *prima facie* right of abandonment in all cases where there is an apparent probability that the owner's loss of the free use and disposal of his ship may be of long, or at all events of very uncertain, continuance (*Rotch v. Edie*, 1795, 6 T. R. 413; 3 R. R. 222). If, again, the arrest creates only a temporary obstruction of the voyage, without giving rise to any permanent loss of control over the ship, it has been held that it cannot give any right to abandon (*Forster v. Christie*, 1809, 11 East 205; 10 R. R. 470).

As regards wages and maintenance of crew during detention of the ship, see *Da Costa v. Newnham* (1788, 2 T. R. 407).

[*Authorities.*—Hall, *International Law*, 4th ed., 1895; J. H. Ferguson, *International Law*, 1884, vol. ii.; Ch. Calvo, *Le Droit International*, Paris, 1888, vol. iii.; Hazlitt and Roche, *Law of Maritime Warfare*, London, 1854; F. Perels, *Droit Maritime International* (traduit par Arendt), Paris, 1884; Holtzendorff's *Handbuch des Völkerrechts*, Hamburg, 1889, vol. iv.; de Martens, *Traité de Droit International*, Paris, 1887, vol. iii.; Wharton, *Digest of the International Law of the United States*, Washington, 1886, vol. iii.; Abbott's *Law of Merchant Ships and Seamen*, 12th ed., 1881; Arnould on *Marine Insurance*, London, 1877, 5th ed., vol. ii.]

**Embarrassing.**—This term is used in law in connection with pleadings. The Court or a judge may at any stage of the proceedings order any matter in any indorsement which may tend to embarrass the fair trial of the action to be struck out or amended, and may in any such case order the costs of the application to be paid as between solicitor and

client (R. S. C. Order 19, r. 27). As the practice as to "embarrassing pleadings" is merely a part of the general law with reference to judicial control over PLEADINGS, it will be treated under that head and the head of STRIKING OUT. Here it may be noted, however, that an "embarrassing" pleading is one of which the party setting it up is not entitled to make use (cp. *Heugh v. Chamberlain*, 1877, 25 W. R. 742).

**Ember Days.**—Certain days in the ecclesiastical year, appointed to be observed as days of fasting or abstinence. They are observed on Wednesday, Friday, and Saturday next after Quadragesima Sunday, or the first Sunday in Lent, Whitsun Day, Holy Cross Day (September 14), and St. Lucy's Day (December 13). The weeks in which these days fall are called Ember weeks; and Canon 31 (of 1603) appoints the Sundays next after Ember weeks for the ordination of priests and deacons, although bishops may, "on urgent occasion" (*Preface to Ordinal*), ordain on any Sunday or holiday.—[See Phillimore, *Eccl. Law*, 2nd ed., i. pp. 92, 807.]

• **Embezzlement** (O. Fr. *embesiler*, *besillier*, to maltreat, destroy).—This term when first used in English law meant making away with goods, money, records, or documents of title (5 Hen. iv. c. 14; 1 Hen. viii. c. 8).

It was often coupled with purloining, but had a somewhat wider sense than that in which it is now most usually understood, and included all cases of fraudulent misappropriation of personal property with which the offender had been intrusted (Murray, *Eng. Dict. s.v.*; Bouvier, *Law Lex. s.v.*); or, in other words, all fraudulent breaches of trust as to personalty where the trust was coupled with possession. At common law no breach of trust as to property, however fraudulent, seems to have been criminal (1 Pollock and Maitland, *Hist. Eng. Law*, 497 n.); and the common law definition of larceny, which involved trespass taking and carrying away, was regarded as not applying to bailees or servants who had possession of their master's goods. This is expressed in the old books by the proposition, "bailment or livery excludes larceny" (*Mirror of Justice*, 7 Seld. Soc. Pub. 25); and by modern scientific lawyers, thus: "a mere wrong to a right to possession was not at common law enough to found proceedings for trespass or theft, unless this was forcible, and immediate taking from the actual possession of some person holding as his delegate, representative, or agent" (1 Pollock and Wright on *Possession*, 199; Pollock and Maitland, *Hist. Eng. Law*, p. 497).

This being so, difficulties arose where servants and agents misappropriated property of their principal or employer of which they had lawfully obtained possession. These difficulties and their consequences are thus summarised by Sir F. Pollock and Mr. Justice Wright in *Possession in the Common Law*, pp. 130, 158. "If the alienor (of property) hands it to a servant of the alienee, a difficulty occurs which is the origin of the separate crime of embezzlement. In such a case the alienor has parted with the property, the right to possession, and also the possession, because he has parted finally with the control of the thing, and has no control over the alienee's servant. In whom, then, is the possession? It was held not to be in the alienee, for he has not yet received the thing, and delivery to his servant for him was not held to vest the possession in him against the servant (though it would be enough to entitle the master to sue or prosecute a stranger for trespass to the servant's possession), and, as the possession must be in some one, it must be in the servant until he does some act



amounting to a submission, attornment, or delivery to the master. Since he was thus in possession acquired without trespass, it followed that "misappropriation by him during such possession was not theft, and the statutory felony of embezzlement was created to meet this case."

For about three centuries English lawyers have been struggling with the consequences of this theory, and Parliament has crammed the statute book with sporadic attempts to deal with these forms of misappropriation—all amply covered by a single clause in the German code.

The first attempt to remove this anomaly was in 1529 (27 Hen. VIII. c. 27), which made it felony for servants to embezzle property of their masters intrusted to their care, to the value of over 40s. In 1690 by 3 & 4 Will. & Mary, c. 9, s. 5, lodgers who took with intent (*inter alia*) to embezzle furniture, etc., let to them, were declared guilty of larceny (Hawk., P. C., bk. i. c. 42, ss. 1, 2). This offence is still felony (24 & 25 Vict. c. 96, s. 74); but the word "embezzle" no longer occurs in its definition.

Until the end of the eighteenth century "embezzlement" was treated as applicable to all misappropriations by persons employed as servants (Pollock and Wright, p. 191), in respect to property intrusted to them by their employers. And the statutes above mentioned do not appear to have dealt with the case of property handed to a servant for his master by a third person (*R. v. Bazeley*, 1799, 2 Leach, 835). In consequence of this case was passed the Act 39 Geo. III. c. 85, which was repealed and re-enacted in 1827 (7 & 8 Geo. IV. cc. 27, 28, s. 47), and is now embodied with modifications in the Larceny Act, 1861 (24 & 25 Vict. c. 96). An enormous mass of decisions on the repealed enactments is collected in Russell on *Crimes*, 6th ed., vol. ii. pp. 833-875.

Sec. 66 of the Act of 1861 provides that "whosoever being a clerk or servant, or being employed for the purpose of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security delivered to or taken into possession by him for or in the name or on account of his master or employer, or any part thereof (or the proceeds thereof), shall be deemed to have feloniously stolen the same from his master or employer, although the chattel, etc., was not received into the possession of the master or employer otherwise than by the actual possession of the clerk or servant." By sec. 68 a similar provision *mutatis mutandis* is made for embezzlement by persons in the public service of the Crown, and constables of any county, borough, or district police force who *virtute officii* are intrusted with the receipt, management, custody, or control of goods, money, or valuable securities. A County Court bailiff appears not to be in the public service, but to be a mere servant of the high bailiff (*R. v. Parsons*, 1888, 16 Cox C. C. 498).

These offences are punishable on conviction by penal servitude from three to fourteen years, or imprisonment with or without hard labour for not over two years (24 & 25 Vict. c. 96, ss. 68, 70; 54 & 55 Vict. c. 69, s. 1). In the case of a second or subsequent conviction, the punishment can be increased.

Embezzlement by officers or servants of the banks of England and Ireland is a felony punishable by penal servitude for life, or not less than three years as imprisonment, *ut supra*. In this case the words "secrete, embezzle, or run away with" are used, and the offence seems to differ from that created by secs. 68, 70, in that it is immaterial whether the property dealt with belonged to the bank or not, if it was lodged with the bank or the officer; and that the offence is not confined to interception of funds, etc., handed to the officer on behalf of the bank.

Besides the provision of the Larceny Act, 1861, as to embezzlement by public servants, there have been a good many statutes passed from time to time with respect to public property, beginning with 31 Eliz. c. 4; 22 Car. II. c. 5, as to military stores; and 22 Geo. II. c. 33, s. 24, as to naval stores.

*Army.*—At present it is (a) an offence punishable by military law with penal servitude where a person, subject to military law, and charged with or concerned in the care or distribution of any public or regimental money or goods, fraudulently misapplies or embezzles it or them, or connives at the commission of the offence by another; and (b) an offence punishable by military law with imprisonment where a soldier embezzles or receives with knowledge of embezzlement any money or goods the property of a comrade or officer, or belonging to a regimental mess or band, or to any regimental institution, or any public money or goods (44 & 45 Vict. c. 58, ss. 17, 18, 56).

*Navy.*—And in the navy wasting or embezzling stores is punishable by a court-martial (29 & 30 Vict. c. 109, s. 33). These enactments are alternative to the remedies given by the ordinary law.

*Public Stores.*—See PUBLIC STORES.

• *Post Office.*—Persons employed under the post office who embezzle or secrete letters are guilty of felony, and punishable by penal servitude for life, or not less than three years if the letter contained a chattel, money, or a valuable security, and from three to seven years in other cases (7 Will. IV. & 1 Vict. c. 36, s. 26; and see POST OFFICE).

*Customs and Excise.*—Embezzlement by customs officers is dealt with, not only by the Larceny Act, but also by secs. 29, 85 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 86; see CUSTOMS); and embezzlement by excise officers by 7 & 8 Geo. IV. c. 53, s. 45 (see EXCISE).

There are also special provisions for punishing the embezzlement of the property of Chelsea and Greenwich Hospitals (7 Geo. IV. c. 16; 28 & 29 Vict. c. 89, s. 45; 38 & 39 Vict. c. 25, s. 17).

*Merchant Shipping.*—Seamen lawfully engaged, and apprentices in the merchant shipping, are guilty of an offence against discipline, and liable on summary conviction to imprisonment for not over twelve weeks, and forfeiture out of wages if they embezzle stores or cargo (57 & 58 Vict. c. 68, ss. 225, 680).

*Poor Law.*—Embezzlement of workhouse property is specially punished by 55 Geo. III. c. 137. See POOR LAW.

*Joint-Stock Companies.*—With respect to joint-stock banking companies, provision was made (by 7 Geo. IV. c. 46) for prosecuting embezzlement by clerks and officers, and (1 & 2 Vict. c. 96; 3 & 4 Vict. c. 111; 5 & 6 Vict. c. 85, s. 1) by shareholders. Most of such banks are now incorporated under the Companies Acts or Private Acts. And so far as directors and members and officials who cannot be described as clerks or servants, misappropriation of corporate property is now dealt with as a misdemeanour under sec. 81 of the Larceny Act, 1861.

*Joint-Owners.*—Until 1868 co-owners of property could not be indicted for misappropriating it, but by the Larceny Act, 1868 (31 & 32 Vict. c. 112), members of a copartnership for purposes of profit (*R. v. Robson*, 1885, 16 Q. B. D. 137), and joint beneficial owners of money, goods, effects, bills, notes, securities, or other property, who steal or embezzle such property, are liable to be dealt with as if they had not been members of the partnership or beneficial owners. This Act, however, does not define what is meant by embezzling, nor how the copartner or joint beneficial owner is to be got into the position of clerk or servant.

It is immaterial whether the constitution of the society or partnership is in accordance with law if its purpose is not criminal, in such cases the illegality not divesting the ownership of the associated persons (*R. v. Tankard*, [1894] 1 Q. B. 538).

There are also special enactments dealing with the fraudulent misappropriation of the funds or property of a municipal borough (39 & 40 Vict. c. 20, s. 3; 45 & 46 Vict. c. 50, s. 117), friendly societies (59 & 60 Vict. c. 25, s. 87 (3)), industrial societies (56 & 57 Vict. c. 39, s. 64), and trade unions (34 & 35 Vict. c. 31, s. 12; 39 & 40 Vict. c. 22, s. 5).

*Cognate Offences.*—A number of offences are indexed and treated in the official index to the statutes and in text-books (e.g. Russell on *Crimes*, and Archbold, *Cr. Pl.*) as embezzlement, although the term "embezzle" is avoided by the Legislature in their definition, which treats the offences as frauds by trustees, agents, bankers, or factors. They comprise the following misdemeanours, all punishable by penal servitude from three to seven years, or imprisonment with or without hard labour, and fine and recognisances, and none triable by a Court of Quarter Sessions (24 & 25 Vict. c. 96, ss. 75, 87; 54 & 55 Vict. c. 69, s. 1):—

(a) Misappropriation in violation of good faith, and contrary to the terms of a direction in writing effected by a person intrusted either solely or jointly with another as banker, merchant, broker (*R. v. Christian*, 1872, L. R. 2 C. C. R. 94; *R. v. Cronmire*, 1886, 16 Cox C. C. 42), attorney (*R. v. Cooper*, 1873, L. R. 2 C. C. R. 123), or other like agent (*R. v. Portugal*, 1885, 16 Q. B. D. 487), with money or a security for money (*R. v. Bowerman*, [1891] 1 Q. B. 112; *R. v. Tatlock*, 1877, 2 Q. B. D. 157), with a direction in writing to apply, pay, or deliver the money or security, or any part of its proceeds, for any purpose or to any person specified in the direction (24 & 25 Vict. c. 96, s. 75). There are numerous decisions on what amounts to a direction in writing (*R. v. Brownlow*, 1878, 14 Cox C. C. 216).

(b) Misappropriation by sale to transfer negotiation, pledge, or otherwise, by any of the persons above specified of any chattel or valuable security, or power of attorney for sale or transfer intrusted to them as such, whether with or without a direction in writing for safe custody or any special purpose, and without authority to sell, transfer, negotiate, or pledge. Special provisions are made excepting trustees and mortgagees, and bankers collecting money due on a valuable security, or for appropriation or exercise of alien or similar right. It would seem that a policy of insurance is not within these clauses (*R. v. Tatlock*, 1876, 2 Q. B. 157).

(c) Misappropriation with intent to defraud by any of the persons above specified of any property of another person intrusted to them for safe custody (s. 76; see *R. v. Cooper*, 1873, L. R. 2 C. C. R. 123; *R. v. Newman*, 1882, 8 Q. B. D. 706; *R. v. Fullagar*, 1879, 14 Cox C. C. 370; *R. v. Bellencontre*, [1891] 2 Q. B. 122).

(d) Fraudulent misappropriation of property by any person intrusted solely or jointly with another with a power of attorney to sell or transfer such property (s. 77).

(e) Misappropriation of goods, or the documents representing them, by factors (s. 79).

(f) Fraudulent misappropriation of trust property by trustees holding it under written instrument. This offence can be prosecuted only by leave of the Attorney-General (24 & 25 Vict. c. 96, s. 80).

(g) Fraudulent misappropriation by a director, member, or public officer of a body corporate or public company of any property of the corporation or company (s. 81); and see ACCOUNTS, FALSIFICATION OF.

Proceedings for these offences are no bar to civil remedies for the wrong sustained; and questions tending to incriminate of the offences put in the course of civil proceedings or in bankruptcy, must be answered. If the answers were given on a compulsory examination in bankruptcy or insolvency, they cannot be put in on a criminal prosecution, and if also given in other civil cases they are the first disclosure of the offence, no criminal proceeding can be taken (24 & 25 Vict. c. 96, s. 85; 53 & 54 Vict. c. 70, s. 27; *R. v. Gunnell*, 1887, 16 Cox C. C. 154; *R. v. Erdheim*, [1896] 2 Q. B. 260).

Embezzling or making away with public records seems to have been a misdemeanour at common law; but is now dealt with as a form of larceny or malicious damage according to the *modus operandi facinoris*, and there is a precedent for an indictment of a surveyor of highways for embezzling or misappropriating road materials (Russell on *Crimes*, 6th ed., vol. ii. p. 366).

*Procedure and Trial.*—The offence of embezzlement by a clerk or servant may be tried where the property was received or where it was appropriated, or where the accused denied its receipt or furnished a false or fraudulent account of its receipt (24 & 25 Vict. c. 96, s. 70; *R. v. Rogers*, 1877, 3 Q. B. D. 28). As to abettors, accessories, and attempts to commit the crime, and receivers of embezzled property, see ABETTOR; ACCESSORY; ATTEMPT; RECEIVING.

An indictment may include three distinct counts for embezzling distinct sums within six months from the first to the last (24 & 25 Vict. c. 96, s. 71), and evidence on each charge is admissible on the other as evidence of retention (*R. v. Stephens*, 1888, 16 Cox C. C. 387; *Makins v. A.-G. of New South Wales*, [1894] App. Cas. 57). Where embezzlement is charged and larceny is proved, or *vice versa*, the jury are entitled to convict the accused (24 & 25 Vict. c. 96, s. 72). The value of the thing taken need not be stated, and where the embezzlement is of goods or chattels, they must be specified; but where it is of money or valuable securities, or their proceeds, they may be described as money simply (24 & 25 Vict. c. 96, s. 71; 14 & 15 Vict. c. 100, s. 18), and the valuable security if described need not be set out in facsimile (14 & 15 Vict. c. 100, s. 5). The embezzled property must be described as that of the master, but the indictment need not say from whom it was received. Embezzlement is frequently complicated with falsification of accounts or of documents found needful by the offender to conceal his peculations (see ACCOUNTS, FALSIFICATION OF; FORGERY; FRAUD); but owing to the distinction still maintained between felony or misdemeanour it is in many cases needful to prefer separate indictments for embezzlement, larceny, and falsification.

The imperfections of the method adopted by the Legislature and judges in dealing with this crime, are well shown by the mass of enactments above enumerated, and by the many difficulties which arise in prosecutions for embezzlement. The Act of 1861 says that the offence is to be deemed to be larceny, but as no provision is made, as in the case of larceny by a bailee or by tenants (c. 96, ss. 6, 74) for the use of the ordinary form of indictment for simple larceny, it is held necessary to charge embezzlement as a distinct offence. When this is done, the question arises whether the property was misappropriated before or after it came into the master's possession, this being the delicate discrimination between larceny, commonly so called, and embezzlement by clerks or servants. This led to numberless wrongful acquittals, until the provision was made in 1857, which is now embodied in 24 & 25 Vict. c. 96, s. 72 (*supra*). Another question frequently arises under 24 & 25 Vict. c. 96, s. 71, namely, whether it is necessary to specify

each separate embezzlement, or whether the embezzlement of lump sums may be charged.

The words "clerk or servant" have also caused endless difficulty owing to controversies, whether the accused is clerk or servant, or is agent. It is in reality a question of fact on the course of employment, except when the duties and functions are defined solely by a written contract or a statute declaring the particular official to be a clerk or servant (25 & 26 Vict. c. 63, s. 16; *R. v. Naylor*, 1872, L. R. 2 C. C. R. 34). But the test usually applied is whether the accused was bound to devote all his time to the employer, or was bound not merely to carry out instructions as to what to do, but as to when and how to do it (*R. v. Walter*, 1848, 3 Cox C. C. 1). The mode of remuneration seems immaterial. The decisions are dealt with at great length in Russell on *Crimes* and Archbold.

*Summary Proceedings.*—In the case of embezzlement by clerks or servants, where the value of the property embezzled does not exceed 40s., the accused may be tried summarily with his own consent, unless he has been previously convicted on indictment. Where the value exceeds £2, the accused cannot be dealt with summarily if he is over sixteen years of age, unless he pleads guilty and the justices accept this plea. Persons between fourteen and sixteen may be summarily tried for embezzlement if they consent, whatever the amount, and children under fourteen can be summarily tried, unless their parents object (31 & 32 Vict. c. 112, s. 2; 42 & 43 Vict. c. 49). There are also several enactments providing for the summary punishment of embezzlement by workmen in special employments, in respect of materials intrusted to them (22 Geo. II. c. 27; 17 Geo. III. c. 56; 6 & 7 Vict. c. 40; and see Burn, *Justice*, 30th ed., tit. "Master and Servant").

[*Authorities.*—Hawk., P. C., bk. i. cc. 33, 42, 43; Stephen, *Hist. Cr.* vol. iii. pp. 152, 172, 175; Stephen, *Dig.*, 5th ed., pp. 258, 271, 276, 425; Archbold, *Crim. Pl.*, 21st ed.; Russell on *Crimes*, 6th ed., vol. ii. pp. 342, 859–879.]

**Emblements.**—Emblements are the growing crops of those vegetable productions of the soil which are annually produced by the labour of the cultivator, and which a tenant has, under certain conditions, a right to claim. These conditions are: (1) that his holding must be for an interest which is uncertain; (2) that its determination must be due to some act independent of his own will. The whole subject is discussed in the article GROWING CROPS.

**Embracery** is an indictable misdemeanour against the administration of justice. It consists in attempting, by bribes or any other corrupt means whatever, other than evidence and argument in open Court, to influence or instruct a juror, or to incline him to be more favourable to one side than to the other in any judicial proceeding. It is immaterial whether a verdict is or is not given in the proceeding, and whether, if given, it is true or false. A juror who wilfully or corruptly consents to embracery is also punishable (see *JURY*); and the offence is specially preserved by the Juries Act, 1825 (6 Geo. IV. c. 50, s. 61).

The punishment on indictment is by imprisonment or fine at the discretion of the Court. Under the unrepealed provisions of 32 Hen. VIII.

c. 9, s. 3, an alternative remedy by action or information for a penalty of £10 is given against those who "embrace any freeholders or jurors."

Prosecutions for the offence are very rare, but there was one in 1891 at the Central Criminal Court, in which the essentials of the indictment were considered (*R. v. Baker*, 113 Cent. Crim. Ct. Sess. Pap. 374).

The offence is usually described as existing at common law. It was first dealt with by statute in 1360 and 1363 (34 Edw. III. c. 8, and 38 Edw. III. st. 1, c. 12); but all the old Acts referring to it, except those already mentioned, are repealed. It is closely connected with CHAMPERTY and MAINTENANCE (*q.v.*).

[*Authorities*.—Hawk., P. C., bk. i. cc. 85, 86; Russell on *Crimes*, 6th ed., vol. i. p. 486.]

**Emigration.**—The law as to emigrants, emigrant ships, etc., is treated under the headings CREW; PASSENGERS. There are a few subsidiary points, however, which must be noticed here.

*Parochial Assistance to Emigration.*—Authority is given—(1) by the Poor Law Amendment Act, 1834, 4 & 5 Will. IV. c. 76, s. 62, to owners and ratepayers to raise money on the security of the rates of any parish for defraying the expenses of the emigration of poor persons *having settlements* in such parish; (2) by the Poor Law Amendment Act, 1844, 7 & 8 Vict. c. 101, s. 29, to the guardians of any union or separate parish for which a board of guardians is, or shall be, established, to exercise the same power; and (3) by the Poor Law Amendment Act, 1850, 13 & 14 Vict. c. 101, s. 4, to the guardians of any union or parish to expend money in facilitating the emigration of poor orphans and deserted children (under the age of sixteen years) who, having no settlement, or no known settlement, are chargeable to some parish in their union or parish respectively.

In (1), (2), and (3) alike *mutatis mutandis* the confirmation of the Board of Trade (formerly the Emigration Commissioners) is necessary; the time limited for repayment of sums charged on the rates, etc., is not to exceed five years from the time of borrowing; all sums so raised by way of loan for purposes of emigration, or such proportion as the Board of Trade by rule or order determine, are to be recoverable against any such person, being over the age of twenty-one, who or whose family having consented to emigrate, refuses to do so, or, having emigrated, returns.

In (3) (*vide supra*) the consent in writing to the loan of the guardians or a majority of the guardians of the parish of chargeability is necessary, as is also the consent to emigration of the orphan or deserted child.

*Emigration of Children, in Reformatory, etc., Schools.*—Under the Reformatory and Industrial Schools Act, 1891, 54 & 55 Vict. c. 23, any youthful offender or child detained in or placed out on licence from a certified reformatory or industrial school and behaving himself well may be *inter alia* disposed of by the managers (as validly as if they were his parents) by emigration, with his own consent and that of the Secretary of State.

As to the emigration by the authority of the Secretary of State of children cruelly treated, see the Prevention of Cruelty to Children Act, 1894, s. 1 (5); and, as to forms of such cruelty, CRUELTY, *To Children*.

**Eminence.**—A title applied to cardinals\* of the Roman Catholic Church. As to the ecclesiastical titles controversy, see the article ROMAN CATHOLIC.

**Eminent Domain.**—The right of the State or the sovereign to its or his own property is absolute, while that of the subject or citizen to his property is only paramount. The citizen holds his property subject always to the right of the sovereign to take it for a public purpose. This right is called "eminent domain." Although the doctrine prevails, and has a wide range in this country (a general sketch of the field of law which it covers is given in the article COMPENSATION; and see also the provisions of the DEFENCE ACTS, which are, strictly speaking, the most exact instance of its applications here, and *A.-G. v. Tomline*, 1879, 12 Ch. D. 214; its other applications will be found discussed under such headings as LANDS CLAUSES; RAILWAYS), the phrase is still in large measure restricted to an American vogue. Some brief account of its use and of the scope and working of the doctrine in America may be of value for comparative and analogical purposes. The constitution of the United States, and of each of the States of the Union, prohibits the taking of private property for public use without just compensation, and there are statutes in each of the States to regulate the matter. A considerable body of law has grown up in America on the subject. The constitutional inhibition is jealously guarded, and the Courts have refined with subtlety upon the precise significance of the terms employed in the constitutions. Thus, what constitutes a "taking," and what is a "public use," and what is "just compensation," have been accurately defined and prescribed by the Courts. The State may itself take property for its own use, as, *e.g.*, land upon which to build a prison or any other public or governmental building; or it may delegate the power to take to a subordinate municipality—a city or county,—as, *e.g.*, to take land for a street or for widening an existing street or alley; or it may delegate the power to take to a body corporate,—a railway, gas, water, telegraph, or canal company,—as, *e.g.*, to take land for a right of way for the construction of any purely public work. But the right to make use of the public streets of a city for railway or other purposes resides primarily in the State, and not in the municipality (*Beekman v. Third Avenue Rwy. Co.*, 47 N. E. Rep. 277; *Ligare v. Chicago, etc., Rwy. Co.*, 46 N. E. Rep. 803).

The exercise of this power by the State, whether directly or by delegation, is known in American law as the exercise of the right of "eminent domain," which may therefore be defined as the power of the State to take private property for public use. Sometimes the fee is taken, and sometimes only an easement; and the easement is not necessarily an exclusive one. Thus, the condemnation by a railway company of a right of way in a street does not necessarily operate to vacate the street as a public highway. Where a mere easement is taken, any use of the property in excess of the precise easement is a trespass which the owner of the fee may enjoin. The power of the State or of its delegate is not exhausted by a single exercise, but the right to condemn can be invoked repeatedly, as occasion may require. Thus, a railway having condemned a right of way, may subsequently condemn more of the same land to widen its right of way, or for station purposes or otherwise.

The legal step taken under the power of eminent domain to acquire private property is known as a "condemnation proceeding." It is commenced by the filing of a petition on due notice in a prescribed Court, and ends in a final order of condemnation, by which only parties and privies are bound, and from which there is the usual right of appeal on terms. The final order of condemnation has all the force and effect of a judgment, so that, for example, it draws interest (*Parks v. City of Boston*, 15 Pick. 198; *Martin v.*

*City of St. Louis*, 41 S. W. Rep. 233). It is competent to condemn not only the property of a private citizen held for private use, but also the property of a municipality, or of a company held for a public use. Thus, it is constitutional to condemn railway property for another public use, as, *e.g.*, for a highway crossing, or for the use of another line of railway, jointly or exclusively; or for a railway company to condemn a crossing over a public highway.

In estimating the value of property to be taken for a public use, no account is to be taken of its value for such use (*United States v. Seufert Bros. Co.*, 78 Fed. Rep. 520); but when a city, by condemnation proceedings, extends a street across a railway, where the railway company owns the fee, the measure of compensation is the amount of decrease in the value of the use of the land taken for railway purposes, caused by its conjoint use as a street. The value of the land, as land, apart from its use for railway purposes, cannot be considered (*Chicago, etc., Rwy. Co. v. City of Chicago*, 17 U. S. Sup. Ct. Rep. 581).

[*Authorities.*—The principal American treatises on the subject are: Lewis on *Eminent Domain* (1888); Mills on *Eminent Domain*, 2nd ed. (1888); Randolph on *Eminent Domain* (1894).]

**• Emphyteutic Tenure.**—By Roman-Dutch law a grant on perpetual quit-rent is understood to be an emphyteutic tenure (*Webb v. Giddy*, *Giddy v. Webb*, 1878, 3 App. Cas. 908). As to emphyteusis, see Green's *Encyclopædia of Scots Law*, vol. v., *s.v.* EMPHYTEUSIS.

**Employ; Employed.**—These terms are used in law in a variety of juxtapositions, which will be found treated under the following heads: "In his employ," see MASTER AND SERVANT; SERVANT; "employed" or "engaged" in coasting trade, see COASTER, vol. iii. at p. 60; "employed in a mine," see MINES AND MINERALS. The primary meaning of the term "to employ" is to retain a person for service and pay him whether employed or not; and not "to find actual employment for," see *Elderton v. Emmens*, 1848, 17 L. J. C. P. 309; 1854, 4 H. L. 624. See also Stroud, *Jud. Dict.*

**Employers and Workmen.**—The Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), enlarged the jurisdiction of the County Court in cases of disputes between employers and workmen (see vol. iii. p. 546, and *Hindley v. Haslam*, 1878, 3 Q. B. D. 481), and gave jurisdiction in cases of disputes where the amount claimed does not exceed £10 (s. 4 (1)) to "Courts of summary jurisdiction," *i.e.* (a) as regards the city of London, the lord mayor or any alderman of the said city sitting at the Mansion House or Guildhall justice room; (b) as regards any police court division in the metropolitan police district, any metropolitan police magistrate sitting at the police court for that division; (c) as regards any city, town, liberty, borough, place, or district for which a stipendiary magistrate is for the time being acting, such stipendiary magistrate sitting at a police court or other place appointed in that behalf; (d) elsewhere any two or more justices of the place to whom jurisdiction is given by the Summary Jurisdiction Acts in petty sessions (s. 10). There is a saving of the jurisdiction of the lord mayor or alderman, or metropolitan or stipendiary magistrate under any other Act (*ibid.*). As to mode of giving



security and summary proceedings, see secs. 8 and 9. A Court of summary jurisdiction is not to make an order for the payment of any sum exceeding £10, exclusive of costs (s. 4 (2)), or to require security to an amount exceeding £10 from any defendant or his surety or sureties (s. 4 (3)). Absence by a workman from his master's service without notice is a "dispute" within the meaning of this Act (*Clemson v. Hubbard*, 1876, 1 Ex. D. 179; followed in *Charles v. Mortgagees of Plymouth Works*, 1890, 60 L. J. M. C. 20, where it was held also that the time for bringing a complaint is not limited to the six months prescribed by the Summary Jurisdiction Act, 1848). For the purpose of the Act, "workman" does not include a domestic or menial servant, but save as aforesaid means any person who, being a labourer, servant in husbandry (see *Davies v. Lord Berwick*, 1861, 30 L. J. M. C. 84), journeyman, artificer (cp. *Ex parte Ormerod*, 1843, 1 Dow. & L. 825; *Lilley v. Elwin*, 1848, 11 Q. B. 742; *Lawrence v. Todd*, 1863, 14 C. B. N. S. 544), handicraftsman, miner, or otherwise engaged in manual labour (the test is whether the manual labour is the substantial or only an incidental part of the employment, see *Hunt v. Great Northern Ry. Co.*, [1891] 1 Q. B. 601, case of guard of goods train who incidentally assisted in loading, coupling, etc.; *Bound v. Lawrence*, [1892] 1 Q. B. 226, case of grocer's assistant whose duty it was to serve customers, but who also incidentally carried goods up from the cellar to the shop; *Grainger v. Aynesley*, 1881, 6 Q. B. D. 182, potter's printer assisted by "transferrers"; *Jackson v. Hill*, 1884, 13 Q. B. D. 618, mechanic employed as "inventor" by manufacturing firm), whether under the age of twenty-one or above that age, has entered into or works under a contract with an employer, "whether express or implied, oral or in writing, and whether a contract of service or one personally to execute any work or labour" (see further, APPRENTICE, vol. i. p. 291; APPRENTICES, SEA; COMBINATION; CONSPIRACY; EMPLOYERS' LIABILITY; FACTORIES AND WORKSHOPS; INFANT; MASTER AND SERVANT; TRUCK ACTS; TRADE UNION).

[*Authorities*.—In addition to the text-books appended to the above articles, see Arnold's *Employers' and Workmen's and Conspiracy and Protection of Property Acts* (1875); Davis, *Labour Laws of 1875*.]

## **Supplemental Notes.**







































